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Administrative Law

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Abstract

Sir Frederic William Maitland, the great English legal historian, wrote, “Law [i]s the point where life and logic [meet].”

KEYWORDS: rules, orders, agency

Administrative Law*

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I.	INTRODUCTION	728
II.	CONSTITUTIONAL AND JURISDICTIONAL ISSUES	729
	A. <i>The Delegation Doctrine</i>	729
	B. <i>Separation of Powers Prohibiting the Usurpation of Functions</i>	731
	C. <i>Accountability: Was the Agency Acting Within the Scope of Its Authority or Ultra Vires?</i> ...	734
	D. <i>Procedural Due Process</i>	736
	E. <i>Agency Jurisdiction</i>	739
	F. <i>Standing Before an Agency</i>	742
	G. <i>Exhaustion of Administrative Remedies</i>	742
	H. <i>Mootness</i>	743
	I. <i>Res Judicata and Collateral Estoppel</i>	744
III.	ESTOPPEL	745
IV.	THE ADMINISTRATIVE PROCEDURE ACT	746
	A. <i>Rules Versus Orders</i>	747
	B. <i>The Rule Making Process</i>	748
	C. <i>Adjudicatory Procedures and Structure</i>	749
	1. <i>Contract Bidding</i>	750
	2. <i>Certificate of Need</i>	753
	D. <i>Licensing</i>	754
	E. <i>What Counts As Evidence in an Administrative Proceeding?</i>	755
	1. <i>Hearsay</i>	756
	F. <i>Final Agency Action</i>	758
	G. <i>An Agency Must Follow Its Own Rules</i>	759
V.	PUBLIC RECORDS ACT	761
VI.	JUDICIAL REVIEW	764
	A. <i>Preservation of the Right to Review</i>	767

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B. <i>Need for An Adequate Explanation by the Agency of Its Factual Findings</i>	769
C. <i>Scope of Hearing Officer's Authority</i>	770
D. <i>Deferential Judicial Review of Factual Issues</i> ..	775
E. <i>Substitution of Judgment on Factual Issues</i> ..	776
F. <i>Unenlightening Judicial Review of Factual Findings</i>	779
G. <i>Deferential Judicial Review of Questions of Law</i>	781
H. <i>Nondeferential Review of Questions of Law</i> ..	784
I. <i>Extraordinarily Deferential Judicial Review</i> ..	787
VII LAND USE AND ZONING	788
VIII. CONCLUDING THOUGHTS	789

I. Introduction

Sir Frederic William Maitland, the great English legal historian, wrote, "Law [i]s the point where life and logic [meet]."¹ In today's world that point of meeting for most people is more often than not occurring in the context of action or inaction by an administrative agency.² The growing importance of administrative agencies in our society and legal system is evinced by the multitude of Florida appellate courts' decisions addressing administrative law issues during the survey period.³

This article continues and builds upon past surveys of Florida ad-

1. SELDEN SOCIETY YEAR BOOK SERIES xxxvii (1903).

2. Florida voters in November amended the Florida Constitution so the legislature could set up an administrative system for handling minor traffic violations rather than clog the judicial system with such cases. FLA. CONST. art. v, § 1 (amended Nov. 8, 1988). As the administrative process has come to dominate our society, the need for the development of appropriate controls over that process has become more and more critical. See *Goldberg v. Kelly*, 397 U.S. 254 (1970). See generally Burris, *Administrative Law, 1987 Survey of Florida Law*, 12 NOVA L. REV. 299 (1988); K. DAVIS, *DISCRETIONARY JUSTICE A PRELIMINARY INQUIRY* 3-26 (1980); J. MASHAW, *BUREAUCRATIC JUSTICE* (1983).

3. The decisions discussed in the article appear in volumes 516 - 531 of the Southern Reporter, Second Series. This article does not generally discuss cases concerning the Workers' Compensation system because its administrative hearing system is not subject to the Florida Administrative Procedure Act. FLA. STAT. § 120.52(1)(c) (1987) ("A deputy commissioner shall not, in the adjudication of workers' compensation claims, be considered an agency or part of an agency for the purposes of this act.").

ministrative law.⁴ The article's goal "is to provide a manageable, yet comprehensive and critical, overview of recent . . . developments in Florida caselaw dealing with administrative law."⁵ This article perhaps errs on the side of comprehensiveness as not all of the cases discussed raise some new and/or important developments in administrative law. But each may add a bit to our knowledge of how the courts are interacting with administrative agencies, and thus, is valuable.

II. Constitutional and Jurisdictional Issues

A. The Delegation Doctrine⁶

In the past it has been noted that "Florida remains one of the few states where delegation arguments are on occasion taken seriously."⁷ The modern vitality of the delegation doctrine in Florida courts is attributable to the Florida Supreme Court's decision in *Askew v. Cross Key Waterways*.⁸ But since 1981, the Florida courts have gradually

4. Burris, *supra* note 2; Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U.L. REV. 965 (1986); Dubbin and Dubbin, *Administrative Law: Access to Review of Official Action - Standing Under the Florida Administrative Procedure Act*, 35 U. MIAMI L. REV. 815 (1981); Fleming and Mallory, *Administrative Law*, 33 U. MIAMI L. REV. 735 (1979); England and Levinson, *Administrative Law*, 31 U. MIAMI L. REV. 749 (1977); Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617 (1975); Levinson, *A Comparison of Florida Administrative Practice Under the Old and the New Administrative Procedure Acts*, 3 FLA. ST. U.L. REV. 72 (1975). See generally FLORIDA BAR'S FLORIDA ADMINISTRATIVE PRACTICE (2d ed. 1981).

5. Burris, *supra* note 2, at 300-01.

6.

Traditionally this doctrine was labeled the nondelegation doctrine. This clearly was a misnomer as courts almost never found the delegation of quasi-legislative or quasi-judicial authority, or the aggregation of legislative, executive and judicial functions in one body to be constitutionally flawed. 'The designation of the doctrine by this name occurred because strongly worded *dictum* in the early Supreme Court cases on the issue indicated a hostility in principle to such actions by Congress, even though all the delegations in these cases were held constitutionally sound.' In keeping with the national reality, rather than the myth, I have labeled this section as delegation doctrine.

Burris, *supra* note 2, at 302 n.15 (citations omitted) (quoting Burris, *Administrative Law, 1986 Eleventh Circuit Survey*, 38 MERCER L. REV. 991, 993 n.13 (1987)).

7. *Id.* See 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3:14 (1978 & Supp. 1980).

8. 372 So. 2d 913 (Fla. 1979) (clarified on rehearing denial). See Burris, *supra*

abandoned the rigorous application of the formalist approach to the delegation doctrine outlined in the *Cross Key* decision.⁹ Instead the courts have adopted a pragmatic approach to delegation issues, similar to that used in the federal courts. This has resulted in a marked decline in the use of the delegation doctrine to declare statutes unconstitutional, a trend that began in 1981 and that has continued.¹⁰ The process of abandoning or ignoring the requirements outlined in the *Cross Key* decision continued during this past year.

Representative of the pragmatic approach that Florida courts took is *Jones v. Department of Revenue*.¹¹ In *Jones*, the court held that the delegation of authority to the Department of Revenue to make projections for the ad valorem tax assessment for each county "based upon the best information available, utilizing professionally accepted methodology"¹² was not an improper delegation of a legislative function. The court found this was only a delegation of authority to execute the law in a highly complex area of economic theory. The critical words in the statute for purposes of constitutionality under the delegation doctrine were "professionally accepted methodology"¹³ as it "incorporates professional standards within the appropriate field - economics. . . ."¹⁴

The court, in *Jones*, explained that an "[u]nlawful delegation refers to the power to make a law rather than the authority to execute; the legislature may expressly authorize designated officials within valid

note 2, at 304-7; Fleming and Mallory, *supra* note 4, at 736-39.

9. Burris, *supra* note 2, at 309-12.

10. Compare *Roslow v. State*, 401 So. 2d 1107 (Fla. 1981); *Bryan v. Board of Medical Examiners*, 398 So. 2d 1354 (Fla. 1981); *Peoples Bank v. Department of Banking and Fin.*, 395 So. 2d 521 (Fla. 1981); *Bigler v. Department of Banking and Fin.*, 394 So. 2d 989 (Fla. 1981); *Brewster Phosphates v. Department of Env'tl. Regulation*, 444 So. 2d 483, 485-86 (Fla. 1st Dist. Ct. App. 1984); *Gulfstream Park Racing Ass'n., Inc. v. Department of Business Regulation*, 443 So. 2d 113, 116 (Fla. 3d Dist. Ct. App. 1983) *aff'd* 441 So. 2d 627 (Fla. 1983); *Burgess v. Department of Commerce*, 436 So. 2d 356 (Fla. 1st Dist. Ct. App. 1983); *Williamson v. Department of Health & Rehabilitative Servs.*, 435 So. 2d 310 (Fla. 1st Dist. Ct. App. 1983) (finding delegations valid); *Astral Liquors, Inc. v. Department of Business Regulation*, 432 So. 2d 93, 95-96 (Fla. 3d Dist. Ct. App. 1983) *with Hialeah, Inc. v. Gulfstream Park Racing Ass'n.* 428 So. 2d 312 (Fla. 4th Dist. Ct. App. 1983) (declared the statute violated the delegation doctrine and was unconstitutional) *overruled by Gulfstream Park Racing Ass'n. v. Department of Business Regulation*, 441 So. 2d 627, 628-30 (Fla. 1983). See generally Burris, *supra* note 2, at 302-12.

11. 523 So. 2d 1211, 1214 (Fla. 1st Dist. Ct. App. 1988).

12. Fla. Stat. § 195.096(3)(b) (1987).

13. *Id.*

14. *Jones*, 523 So. 2d at 1215.

limitations to provide rules for the complete operation and enforcement of the law within its expressed general purpose.”¹⁵ The delegation doctrine “permit[s] administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions . . . which . . . make direct legislative control impractical or ineffective . . . [and] make the drafting of detailed or specific legislation impractical or undesirable.”¹⁶ This conceptualization of the delegation problem has led the Florida courts to functionally adopt an approach to delegation issues which closely resembles that of the federal courts’ “intelligible principle”¹⁷ test. The formalistic approach of *Cross Key* has not been overruled; it remains an often cited opinion, but it is seldom followed in spirit. The result today is that the legislature has to worry less about the threat that the delegation doctrine poses, and the courts are much less receptive compared to the 1979-1983 period to the argument that a statute is an unconstitutional delegation of authority.

B. Separation of Powers Prohibiting the Usurpation of Functions¹⁸

The courts may have functionally abandoned the delegation doctrine as a significant check on legislative authority, but other aspects of the separation of powers in the Florida Constitution are alive and well.¹⁹ The courts were particularly attentive during the past year to any attempt by one branch of the government to usurp the function of another branch.

In some cases, the courts policed themselves to ensure the courts did not usurp the functions of the other branches. In *Shupe v. State*,²⁰ the district court of appeal noted that the trial court had usurped the functions delegated by the legislature to the Department of Corrections in administering the granting of “gain time” to prisoners by prohibiting the granting of “gain time” in the sentence the trial court imposed.²¹ In

15. *Id.* at 1214. *See also* *Microtel, Inc. v. Public Serv. Comm’n*, 464 So. 2d 1189, 1191 (Fla. 1985).

16. *Jones*, 523 So. 2d at 1214. *See also* *Microtel, Inc.*, 464 So. 2d at 1191.

17. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

18. *See* Burris, *supra* note 2, at 314-16.

19. *Infra* notes 20-44 and accompanying text.

20. 516 So. 2d 73 (Fla. 5th Dist. Ct. App. 1987).

21. *Cf.* *State v. Coban*, 520 So. 2d 40, 41 (Fla. 1988) (“The plenary power of the legislature to prescribe punishment for criminal offenses cannot be abrogated by the courts in the guise of fashioning an equitable sentence outside the statutory

A.T. v. State,²² the court held that the trial court in a delinquency proceeding could not list an option for disposition of a juvenile which was not one of the disposition options listed by HRS.²³ Such an order by the trial court invaded the function delegated to the HRS by the legislature.²⁴ In *Palm Beach County v. Tinnerman*,²⁵ the court held that the "classification of lands under zoning ordinances involves the exercise of legislative power. Thus, the doctrine of separation of powers prevents the courts from interfering with . . . [the exercise of this legislative power by] direct[ing a] zoning authority to zone a property in a particular manner. . . ."²⁶ A court's power in reviewing zoning decisions is limited to overturning such decisions only if it concludes the decision was so arbitrary and capricious as applied to a particular piece of property that it constitutes a clear abuse of discretion.²⁷ The power, in some very limited circumstances, to overturn a zoning decision goes no further, and in no case can the court direct how a piece of property should be zoned.²⁸

In other cases, the courts monitored the legislature's actions to ensure that it did not invade the judicial or executive functions. In *McNair v. Criminal Justice Standards & Training Commission*,²⁹ the court found that the legislature had not usurped the judicial function in treating a nolo contendere plea as a circumstance which justified revocation of a person's certification as a correctional officer.³⁰ The court also held that the statute did not impermissibly invade the executive branch's pardon power.³¹

Following this approach in *Sandlin v. Criminal Justice Standards & Training Commission*,³² the First District Court of Appeal held that

provisions.").

22. 516 So. 2d 1104 (Fla. 2d Dist. Ct. App. 1987).

23. *Id.* at 1105.

24. *See, e.g., T.D. v. State*, 486 So. 2d 40 (Fla. 2d Dist. Ct. App. 1986).

25. 517 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988), *rev. denied*, 528 So. 2d 1183 (Fla 1988).

26. *Id.* at 700.

27. *Marell v. Hardy*, 450 So. 2d 1207, 1211 (Fla. 4th Dist. Ct. App. 1984).

28. *Tinnerman*, 517 So. 2d at 700. *See also* *Florida Mining & Materials Corp. v. City of Port Orange*, 518 So. 2d 311, 314-15 (Fla. 5th Dist. Ct. App. 1988) (Sharp, J., dissenting). *But see* *Florida Mining & Materials Corp. v. City of Port Orange*, 518 So. 2d 311, 313-14.

29. 518 So. 2d 390 (Fla. 1st Dist. Ct. App. 1987).

30. *Id.* at 391.

31. *Id.*

32. 518 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1987).

[w]hile . . . the power of pardon is vested exclusively in the executive branch, it does not follow that the legislature's legitimate exercise of its police power to protect the public welfare by precluding employment as police officers those who have been convicted of crimes, because it may affect persons who have been pardoned by the executive branch, thereby becomes an encroachment upon the exercise of the pardon power. . . . [S]uch a determination by the legislature is within its police power, and does not unconstitutionally impinge upon the executive's clemency power.³³

Thus the legislature could permissibly delegate to the Criminal Justice Standards and Training Commission the mandatory duty of excluding from the list of those eligible to serve as police officers all individuals who have been convicted of a felony, even if such an individual has received a pardon from the Governor and was now an exemplary citizen of good moral character.

But the Florida Supreme Court disagreed with the reasoning of the First District Court of Appeal and reversed directing that the Commission consider the application of Sandlin. In *Sandlin v. Criminal Justice Standards & Training Commission*,³⁴ the Florida Supreme Court noted that while the legislature may require persons who have received a pardon³⁵ to demonstrate their good moral character in order to practice a profession or qualify for certain types of employment, it can not "creat[e] a nonrebuttable presumption that pardoned felons are not of good character."³⁶ Such a legislative act would impermissibly interfere with the executive's exclusive power over pardons. The court then avoided declaring Florida Statutes, section 943.13(7) unconstitutional by holding that the legislature in enacting it did not create such a nonrebuttable presumption. The statute merely permitted the Criminal Justice Standards and Training Commission to use the pardon as *some* evidence concerning the question of whether an applicant met the good character requirement. The court pointed out that in addition to the pardon, the statute also required the Commission to consider other evidence of the applicant's good character for certification as a law enforcement officer.³⁷ In short, the statute did not authorize the Commis-

33. *Id.* at 1297. *But see id.* at 1298-1300 (Ervin, J., dissenting).

34. 531 So. 2d 1344 (Fla. 1988).

35. A full pardon restores a felon's civil rights. *Id.* at 1345-46.

36. *Id.* at 1346.

37. *Id.* at 1346-47.

sion to treat the pardon as a "nonrebuttable presumption."³⁸ Therefore it did not invade the executive branch's pardon power.

The courts were also attentive to possible invasions of the judicial function by the legislature. In *Florida Bar re Advisory Opinion HRS Nonlawyer Counselor*,³⁹ the court held in an advisory opinion that while the legislature may authorize agencies to promulgate rules authorizing persons other than those admitted to practice law in Florida to represent individuals in agency proceedings, agencies cannot be delegated the power by the legislature to authorize non-lawyers to represent state agencies in the Florida courts. The practice of law in the courts is controlled by the Florida Supreme Court not the legislature and administrative agencies.⁴⁰ In a similar vein, in *Laborers' International Union v. Burroughs*,⁴¹ the court held that an agency may not award damages as this was a judicial function.⁴² While in *Coleman v. Austin*,⁴³ the court held that the Public Records Act did not violate the separation of powers doctrine by authorizing the discovery of inter-office or intra-office memoranda prepared by state attorneys as part of their trial preparation.⁴⁴

C. Accountability: Was the Agency Acting Within the Scope of Its Authority or Ultra Vires?⁴⁵

Generally, if the legislature has granted the agency broad authority to implement the authority delegated to the agency through the rule making process, then the courts are unlikely to find the agency's exer-

38. *Id.* at 1346 (Thus on remand the Commission must consider Sandlin's application).

39. 518 So. 2d 1270 (Fla. 1988).

40. *Id.* at 1272. *Cf. Z&O Realty Assocs. v. Lakow*, 519 So. 2d 3 (Fla. 3d Dist. Ct. App. 1988) (clarified) (discussion of how to resolve conflict between a court rule and a statute).

41. 522 So. 2d 852 (Fla. 3d Dist. Ct. App. 1988), *rev. dismissed*, 531 So. 2d 167 (Fla. 1988).

42. *Id.* at 854. *But see id.* at 856.

43. 521 So. 2d 247 (Fla. 1st Dist. Ct. App. 1988).

44. *Id.* at 248.

45. "It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute. A rule which purports to do so constitutes an invalid exercise of delegated legislative authority." *Department of Business Regulation v. Salvation Ltd.*, 452 So. 2d 65, 66 (Fla. 1st Dist. Ct. App. 1984). (citations omitted) *See Burris supra* note 2, at 516-22 (discussion of accountability cases from 1979-1987).

cise of that authority invalid.⁴⁶ There are occasions when the courts will intervene to declare the agency's action is ultra vires - beyond its delegated authority. After the demise of the *Cross Key* approach to the delegation doctrine,⁴⁷ the courts are increasingly turning to ultra vires analysis to control the scope of authority delegated to agencies.⁴⁸

The Department of Insurance is authorized by statute, in certain circumstances, to designate by order "any county or area" eligible for windstorm coverage through the state mandated windstorm insurance underwriting plan.⁴⁹ One of the circumstances which must exist for the Department of Insurance to invoke this authority is that mortgages are in default in the area due to a lack of windstorm coverage.⁵⁰ In *Florida Windstorm Underwriting Association v. Sunset Realty Corp.*,⁵¹ the court held that the Department of Insurance must make a specific finding of mortgage default in the county or area due to the unavailability of windstorm insurance before it can properly invoke its power under the statute. The failure of the Department of Insurance to make such a finding rendered its order designating Charlotte County eligible for windstorm coverage void as an abuse of discretion. The Department of Insurance must comply with the requirements of the statute in order to use its power under the statute, or it is acting outside the scope of its delegated authority.⁵²

Another example of this type of decision is *Jordan v. Department of Professional Regulation*.⁵³ In *Jordan*, the court held that the Department of Professional Regulation acted beyond the scope of its delegated authority in promulgating a rule which prohibited a nurse whose license was revoked from seeking reinstatement upon showing he was rehabilitated and no longer posed a threat to the public.⁵⁴

As noted earlier, the courts will not declare very many actions of agencies ultra vires. More often the courts will consider such an attack

46. *Associated Schools, Inc. v. Department of Educ.*, 522 So. 2d 426, 428 (Fla. 1st Dist. Ct. App. 1988).

47. *Supra* notes 8-17 and accompanying text.

48. This is true in the federal system also. Burris, *Administrative Law*, 1986 *Eleventh Circuit Survey*, 38 MERCER L. REV. 991, 995-1001 (1987).

49. FLA. STAT. § 627.351(2)(c) (1987).

50. *Id.* § 627.351(c)(1).

51. 516 So. 2d 1037 (Fla. 1st Dist. Ct. App. 1987).

52. *Id.* at 1038. *Cf.* *State v. Frontier Acres Community Dev. Dist.*, 472 So. 2d 455 (Fla. 1985).

53. 522 So. 2d 450 (Fla. 1st Dist. Ct. App. 1988).

54. *Id.* at 452-53.

on an agency's decision and then reject it. An example of this is *Fairfield Communities v. Florida Land & Water Adjudicatory Commission*.⁵⁵ In *Fairfield Communities*, the court held that the Commission, which was delegated the authority to promulgate rules to implement a statutory scheme it is charged with administering, may choose to promulgate procedural rules, permitting interveners who normally would not have standing to initiate the administrative hearing. Such procedural rules assure the full development of issues in the Commission's administrative hearings, and on rare occasions may bring matters to the attention of the Commission which otherwise may have been overlooked. Such procedural rules are not beyond the scope of the Commission's rule making authority delegated by the legislature.⁵⁶

D. Procedural Due Process⁵⁷

The procedural due process doctrine requires that a party who has been deprived of a constitutionally protected liberty or property interest by state action be offered the opportunity for either a pre-deprivation or post-deprivation hearing.⁵⁸ The hearing is required to assure that the state has the information needed for a decision and so minimize the chance of an error occurring.

The threshold issue in all cases concerning procedural due process is whether there is a constitutionally protected liberty or property interest at stake?⁵⁹ If not, then there is no right to a hearing and no need to embark on the *Mathews v. Eldridge* balancing test analysis.⁶⁰ The

55. 522 So. 2d 1012 (Fla. 1st Dist. Ct. App. 1988).

56. *Id.* at 1014-15.

57. U.S. CONST., amend. XIV, § 1; FLA. CONST., art. I, § 9. See Burris, *supra* note 2, 323-34 (discussion of procedural due process cases from 1979-1987).

58. Generally courts state there is a preference for the use of a pre-deprivation hearing, but over the years the post-deprivation hearing has been held sufficient in almost all cases because it will provide a meaningful hearing. The decline of the pre-deprivation hearing preference was almost inevitable after the establishment of the *Mathews v. Eldridge* balancing test which did not incorporate it as one of its considerations. 424 U.S. 319, 334-35 (1976).

59. *E.g.* Bishop v. Wood, 426 U.S. 341, 345 (1976).

60.

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional

United States Supreme Court has made it clear that whether a constitutionally protected property interests exists is almost always a function of state law.⁶¹ As a result, there are fewer cases each year discussing and deciding what process is due and more cases just holding that no constitutionally protected property interest was at stake. The decisions of the Florida courts reflect this trend.⁶²

In *Crews v. Ellis*,⁶³ the court held that a deputy sheriff did not have a constitutionally protected property interest in his job when he was not covered by a properly adopted civil service system. Under the Florida Constitution, the sheriff's department cannot adopt such a system by administrative order. It "must be created by general, special or local law."⁶⁴ There can be no mutuality of expectation necessary for the creation of a constitutionally protected property interest when it is clear the person acting for the state lacks the authority to so act.⁶⁵ In another case illustrative of this trend, the court considered whether the City of Clearwater's former policy of sick leave conversion, which per-

or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334-35.

61. "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (quoting *Roth*). In *Board of Regents v. Roth*, the Supreme Court adopted a constitutional test for determining if a constitutionally protected property interest is at stake: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. 564, 577 (1972). See also *Perry v. Sindermann*, 408 U.S. 593 (1972) (development of the mutuality of expectation element in the creation of a property interests).

62. In *Bayonet Point Regional Medical Center v. Department of Health and Rehabilitative Services*, 516 So. 2d 995 (Fla. 1st Dist Ct. App. 1987), Judge Ervin in his concurring and dissenting opinion asserted that "[a] license, however, is not property in any constitutional sense." Judge Ervin went on to note that "[o]nce . . . a license is issued it has the quality of property." *Id.* at 999 n.3. If this is true, then it is only a matter of legislative grace that entitles an applicant for a license to a hearing on whether the denial of the license was proper.

63. 531 So. 2d 1372 (Fla. 1st Dist. Ct. App. 1988).

64. *Id.* at 1375.

65. The court reversed and remanded the case on the issue of whether there was a contractual basis for a constitutionally protected property interest which entitled Crews to procedural due process protection before he was dismissed from his position as deputy sheriff. *Id.* at 1376-77. Cf. *Tuckman v. Florida State Univ.*, 530 So. 2d 1041 (Fla. 1st Dist. Ct. App. 1988) (rejected breach of contract claim).

mitted "employees who remained with the city until retirement to receive up to fifty percent of their unused sick leave as terminal pay," created a constitutionally protected property interest?⁶⁶ The City unilaterally modified the policy in May, 1985, so that only twenty-five percent of the employees' unused sick leave could be used as terminal pay.⁶⁷ Then in August, 1985, even this reduced sick leave conversion benefit was repealed.⁶⁸ In *City of Clearwater v. Bekker*,⁶⁹ the court held that city employees had no constitutionally protected property interest in the sick leave conversion benefit. The sick leave conversion benefit was a unilateral offer made by the city and subject to withdrawal at anytime. It was not part of any contract. The employees only had a "[m]ere expectation" that it would continue. Nothing in the city's conduct and those of the employees indicated that the employees "had acquired a legitimate claim of entitlement"⁷⁰ in the sick leave conversion benefit under the *Roth*⁷¹ case.

The only other administrative law procedural due process cases decided during the past year concerned the requirement of notice. In *Conklin Center v. Williams*,⁷² the court held that procedural due process required that parties to an administrative hearing must be given notice of the matters which will be addressed in the hearing. At no time was the Conklin Center "charged with having 'a discriminatory work environment.'"⁷³ Since the Conklin Center never received notice of this charge, it was inappropriate for the Florida Commission on Human Relations in reviewing a hearing officer's decision to find that it had engaged in such misconduct. In *Algor v. Florida Unemployment Appeals Compensation*,⁷⁴ the court held that an applicant who was denied unemployment compensation because he failed to appear at his hearing before an appeals referee must be informed by the Unemploy-

66. *City of Clearwater v. Bekker*, 526 So. 2d 961, 962 (Fla. 2d Dist. Ct. App. 1988).

67. *Id.* at 963.

68. *Id.* at 963-64. The city had determined that it was too costly.

69. *Id.* at 961.

70. *Id.* at 965. See also *Department of Admin. v. Herring*, 530 So. 2d 962, 966-67 (Fla. 1st Dist. Ct. App. 1988).

71. *Board of Regents v. Roth*, 408 U.S. 564 (1972).

72. 519 So. 2d 38 (Fla. 5th Dist. Ct. App. 1988).

73. *Id.* at 39. Accord *Margulies v. Margulies*, 528 So. 2d 957, 959 (Fla. 3d Dist. Ct. App. 1988); *Mays v. State*, 519 So. 2d 618 (Fla. 1988); *Ivey v. State*, 519 So. 2d 648 (Fla. 4th Dist. Ct. App. 1988) (per curiam).

74. 516 So. 2d 1113 (Fla. 2d Dist. Ct. App. 1987).

ment Compensation Office that he may appeal this decision to the Unemployment Appeals Commission on the issue of whether "he had good cause for not attending the . . . hearing before the [appeals] referee."⁷⁵ The court required the Unemployment Compensation Office to provide this notice to the applicant because applicants are generally not represented by attorneys in the proceedings, and it would be unfair not to point out this provision in the regulations to the applicant in this circumstance.⁷⁶

E. Agency Jurisdiction

Like the courts, agencies must have jurisdiction to act. There are a variety of ways in which an agency can be deprived of jurisdiction. In *Bass v. Department of Transportation*,⁷⁷ the court held that a career service employee who is a member of a union has two options concerning how to contest disciplinary action. He may either use the civil service appeal procedure or the union grievance procedure, but not both.⁷⁸ In this case the employee chose to pursue the union grievance procedure, this decision precluded the employee from bringing a complaint before the Public Employees Relations Commission. The Commission properly dismissed his complaint.⁷⁹

Another potential way in which agency jurisdiction is foreclosed is when a party fails to timely invoke the agency's jurisdiction.⁸⁰ *Rudloe v. Florida Department of Environmental Regulation*⁸¹ is an example of this type of jurisdictional forfeiture. On November 30, 1985, the Department of Environmental Regulation published notice of its intent to permit Taylor County to dredge a channel in an environmental sensitive part of the Gulf of Mexico coast. Robert Sadousky filed a timely petition challenging the decision and requesting a formal administrative hearing. Four months later, Sadousky moved to voluntarily dismiss his petition challenging the Department's decision. On the same day, but after the dismissal notice was filed by Sadousky, Jack Rudloe and Gulf

75. *Id.* at 1114. See FLA. ADMIN. CODE ANN. r. 38E-5.017(3)(a) (1988).

76. *Algor*, 516 So. 2d at 1114. This appears to be based upon due process concerns rather than the APA, but it is not clear from the opinion.

77. 516 So. 2d 972 (Fla. 1st Dist. Ct. App. 1988) (per curiam).

78. FLA. STAT. § 447.401 (1987).

79. *Bass*, 516 So. 2d at 973.

80. *E.g.*, *DeNigris v. City of Fort Lauderdale*, 518 So. 2d 469, 470 (Fla. 4th Dist. Ct. App. 1988).

81. 517 So. 2d 731 (Fla. 1st Dist. Ct. App. 1987).

Specimen Company filed a petition to intervene in the proceeding initiated by Sadousky. The hearing officer granted Sadousky's motion for dismissal of his petition and denied the petition to intervene. The subsequent attempt by Rudloe and Gulf Specimen Company to seek an administrative review of the Department's decision concerning the granting of the dredge permit was rebuffed as untimely.⁸² On appeal the First District Court of Appeal reaffirmed the principle that "where a petition [seeking administrative review of an agency decision] is withdrawn, agency jurisdiction ceases to exist."⁸³ Once the agency no longer has jurisdiction there is no proceeding available for a party to intervene in. The Department correctly denied the petition for intervention. Nor can Rudloe and Gulf Specimen Company properly file a petition challenging the Department's decision where the time for filing such a petition has passed.⁸⁴ The court noted that "there are some circumstances where the agency's action is so different from the proposed action, that a third party could not know from a review of the file that the agency would rule as it did," and thus the third party may file a petition challenging the agency action even after the passage of the normal time for filing such a challenge.⁸⁵ The court in *Rudloe* found no indication in the record that this exception should apply.

*Woodward v. Florida State University*⁸⁶ is another case where the failure to meet the deadline for requesting review of an agency decision permitted the agency to avoid invoking its jurisdiction. The court noted that where an agency has properly established by rule that a request for an administrative hearing must be filed "within twenty-one (21) days from receipt of written notice of . . . [an agency's] decision,"⁸⁷ an agency is justified in denying the requested hearing because of failure to make the request in a timely fashion.⁸⁸ The court in *Woodward* held that notice to a party's representative is sufficient and complies with

82. *Id.* at 732.

83. *Id.*

84. FLA. STAT. § 403.815 (1987) (Petitions requesting a hearing to challenge DER's decisions must be filed within fourteen days after the DER publishes its notice.). *But see Rudloe*, 517 So. 2d at 734-35 (Booth, J., dissenting) (Rudloe and Gulf Specimen Company filed a timely challenge to the DER's action if DER did not properly give notice of its intended action. They are entitled to administrative hearing on this issue.).

85. *Rudloe*, 517 So. 2d at 733.

86. 518 So. 2d 336 (Fla. 1st Dist. Ct. App. 1987).

87. FLA. ADMIN. CODE ANN. r. 28-5.111 (1980).

Id. at 336.

the receipt of notice requirement of the agency rule.⁸⁹

But in *Machules v. Department of Administration*,⁹⁰ the court in dicta noted that the twenty day period for filing an administrative appeal of a personnel decision was not jurisdictional.⁹¹ The court went on to hold, in a case of first impression before the Florida Supreme Court, that the twenty day time period can be equitably tolled.⁹² "Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum."⁹³ In this case, Machules was entitled to the benefit of equitable tolling of the time for requesting an administrative hearing because he "was misled or lulled into inaction . . . and his appeal to Department of Administration raised the identical issue raised in the original timely claim filed in the wrong forum."⁹⁴ In *Rothblatt v. Department of Health & Rehabilitative Services*,⁹⁵ the court held that failure of a party to timely file a request for an administrative hearing does not deprive the agency of jurisdiction if the late filing was the result of excusable neglect. In such cases, the agency should grant the party the requested administrative hearing.⁹⁶

89. *Id.* at 337. See FLA. ADMIN. CODE ANN. r. 28-5.109 (1980). But see *Woodward*, 518 So. 2d at 338-41 (Shivers, J., dissenting) (Judge Shivers argued that sending notice to the party's representative was inadequate to begin the ticking of the twenty-one day clock for requesting an administrative hearing because the clear language of the rule which recognizes only notice received by the party. Any other decision is arguably inconsistent with earlier decisions by this court and raises procedural due process concerns.). See generally *Henry v. State Dept. of Admin.*, 431 So. 2d 677 (Fla. 1st Dist. Ct. App. 1983).

90. 523 So. 2d 1132 (Fla. 1988).

91. *Id.* at 1133 n.2.

92. "The tolling doctrine is used in the interest of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing." *Id.* at 1135.

93. *Id.* The court noted other important considerations in such cases may be whether the party had the assistance of counsel and the complexity of the rules which established the time limit. *Id.*

94. *Id.* at 1134. But see *id.* at 1137 (Grimes, J., dissenting) (The facts of this case do not justify applying the equitable tolling doctrine to avoid the time limit.).

95. 520 So. 2d 644 (Fla. 4th Dist. Ct. App. 1988).

96. *Id.* at 645. See also *Robinson v. Florida Unemployment Appeals Comm'n*, 526 So. 2d 198 (Fla. 4th Dist. Ct. App. 1988). In *Robinson* Judge Hersey in his concurring opinion reached this result because of procedural due process concerns. *Id.* at 200 (Hersey, J., concurring).

The decisions in *Machules* and *Rothblatt* are important because they provide a limited exception to the usually harsh application of time limitations imposed by Florida courts and agencies. Of particular importance for future cases was the Florida Supreme Court's characterization of the time limitation in *Machules* as not jurisdictional. If the timing of the filing of a request for a hearing is not jurisdictional, then the discretion of the courts and agencies in waiving the timeliness requirement may be greater in many cases than past precedent has suggested.⁹⁷

F. Standing Before an Agency⁹⁸

In *Manasota Osteopathic General Hospital, Inc. v. State Department of Health & Rehabilitative Services*,⁹⁹ the court applied the now well established zone of interest test¹⁰⁰ in holding that the hospitals in this case had standing. "Party status in Section 120.57(1) hearings requires a 'substantial interest' in the outcome, such interest being defined as a sufficiently immediate injury in fact within the zone of interest the proceeding was designed to protect."¹⁰¹ This broad concept allows any affected person to participate in the agency hearing process.¹⁰²

G. Exhaustion of Administrative Remedies¹⁰³

"As a general proposition, where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the court will act."¹⁰⁴ This familiar doctrine was applied in *Sec-*

97. See Burris, *supra* note 2, at 385-86.

98. *Id.* at 336-43 (discussion of agency standing cases from 1979-1987).

99. 523 So. 2d 710, 711 (Fla. 1st Dist. Ct. App. 1988).

100. See Dore, *supra* note 4; Dubbin and Dubbin, *supra* note 4; Burris, *supra* note 2, at 334-36.

101. *Manasota*, 523 So. 2d at 711.

102. *Id.*

103. See Burris, *supra* note 2, at 343-48 (discussion of exhaustion doctrine cases from 1979-1987).

104. *Halifax Area Council v. City of Daytona Beach*, 385 So. 2d 184, 186 (Fla. 5th Dist. Ct. App. 1980). *Cf.* *Torres v. Department of Health & Rehabilitative Servs.*, 516 So. 2d 13, 14 (Fla. 3d Dist Ct. App. 1987) (The court held that a dependence proceeding in the circuit court can not be used to discover whether the Department of Health and Rehabilitative Services has followed the Status Offender Policy Guidelines promulgated by HRS in placing a child which had been adjudicated dependent by the

1989]

cia v. Wainwright.¹⁰⁵ In *Seccia*, the court held that before a prisoner can properly invoke the jurisdiction of the circuit courts through a writ of habeas corpus, challenging a decision of the prison warden to put him in administrative confinement, he must exhaust his administrative remedies.¹⁰⁶

H. Mootness

The mootness doctrine permits courts to dismiss cases where there is no continuing controversy between the parties. An example of the mootness doctrine is *Department of Highway Safety & Motor Vehicles v. Heredia*.¹⁰⁷ In *Heredia*, the court held that an appeal of the Department of Highway Safety and Motor Vehicles's order, suspending a driver's license, was rendered moot when the Department rescinded its suspension order.¹⁰⁸ In doing so the court recognized there could be occasions where the mootness doctrine should not prevent the court from addressing the issue raised. One such occasion is where the case involved an issue "of wide public interest, . . . capable of repetition, and it involves the duties and authority of public officials in the administration of the law."¹⁰⁹

But courts should not hastily invoke the mootness doctrine especially where there are other grounds for the decision. In *Rhoads v. Reback*,¹¹⁰ the court held that although an administrative agency's refusal to grant permits for the extension of a dock may render an action for an injunction to enforce a surface easement over submerged land moot, the refusal does not justify the circuit court's dismissal of the lawsuit because the court lacked jurisdiction before such a decision was made.¹¹¹

circuit court.).

105. 517 So. 2d 80 (Fla. 1st Dist. Ct. App. 1987).

106. *Id.* at 81. See also *Bowling v. Florida Dept. of Corrections*, 389 So. 2d 1031 (Fla. 1st Dist. Ct. App. 1980).

107. 520 So. 2d 61 (Fla. 3d Dist. Ct. App. 1988).

108. See also *Miller Brewing Co. v. Department of Business Regulation*, 527 So. 2d 891 (Fla. 1st Dist. Ct. App. 1988) (per curiam).

109. *Heredia*, 520 So. 2d at 61. The court rejected the claim that these factors were present in this case in part because of subsequent amendments to the statutory system appeared to resolve the issue. *Id.* at 62.

110. 518 So. 2d 355 (Fla. 4th Dist. Ct. App. 1988).

111. *Id.* at 356.

I. Res Judicata¹¹² and Collateral Estoppel

In order for res judicata to act as a bar to subsequent relitigation, there must be a valid final agency or court order in a prior proceeding and identity in '(1) . . . the thing sued for; (2) . . . the cause of action; (3) . . . [the] persons and parties of the action; and (4) . . . the quality in the person for or against whom the claim is made.' If the requirements of res judicata are satisfied, then neither agencies nor courts may subsequently relitigate issues already resolved by a court or another agency.¹¹³

The res judicata doctrine was applied in only one case this past year, *School Board v. Unemployment Appeals Commission*.¹¹⁴ In *School Board*, the court held that res judicata barred relitigation, in the context of a hearing on an application for unemployment compensation, of factual issues determined in the school board's personnel decision when the school board's decision was affirmed by a court in the judicial review process.¹¹⁵

In *Taube v. Florida Keys Aqueduct Authority*,¹¹⁶ the court applied the closely related doctrine of collateral estoppel.¹¹⁷ In *Taube*, an employee was terminated because he wrecked an agency's vehicle while driving under the influence of alcohol. The Career Service Council of Monroe County reinstated the employee because he was not convicted of driving under the influence, and because the matter should not be relitigated in the employment context. The Third District Court of Appeal reversed and held that an agency was not collaterally estopped by the decision in a criminal proceeding concerning an employee's driving of an agency vehicle while under the influence of alcohol. The matter could be relitigated in the personnel decision process.¹¹⁸

112. See Burris, *supra* note 2, at 351-54.

113. *Id.* at 352 (quoting *Neidhart v. Pioneer Federal Savings and Loan Assoc.*, 498 So. 2d 594, 596 (Fla. 2d Dist. Ct. App. 1986)) (footnotes omitted).

114. 522 So. 2d 556 (Fla. 5th Dist. Ct. App. 1988).

115. *Id.* at 557.

116. 516 So. 2d 90 (Fla. 3d Dist. Ct. App. 1987).

117. "A survey of relevant informed opinion reveals little agreement as to how the doctrines [of collateral estoppel and res judicata] should be defined, how they differ from each other, or how the two may be reliably differentiated in any but the most commonplace situations." *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Comm.*, 775 F.2d 366, 373 (D.C. Cir. 1985).

118. *Taube*, 516 So. 2d at 91.

III. Estoppel¹¹⁹

As a threshold matter, estoppel will not bar an agency from taking action where it was unreasonable for a party to rely upon the agency's action.¹²⁰ In *State Department of Transportation v. Clancy*,¹²¹ the court held that the Department of Transportation was not estopped by its past practice, of not requiring the employee to place leave requests in writing, from enforcing the rule that an employee who was absent for three consecutive working days without leave authorization had abandoned his position and resigned from his position. In this case the estoppel claim failed because there was no basis for concluding that the employee could reasonably have relied on the Department's practice of preparing leave papers for him to sign to justify his absence as he never signed any leave papers.¹²²

However, where the agency has taken an official position, it is easier to prove it was reasonable for a party to rely upon the action of the agency. In *Health Care & Retirement Corporation of America v. Department of Health & Rehabilitative Services*,¹²³ the court noted that if an agency had formally agreed to waive procedural irregularities in an application, then it could not subsequently use those procedural irregularities as the basis for denying the application.¹²⁴ The agency bound itself by the stipulation to waive procedural irregularities and was estopped from subsequently changing its position. Similarly, when the Department of Insurance had acknowledged the receipt of an accident report claim within the statute of limitations, it was estopped from subsequently claiming after the passage of the statute of limitations that it never received the accident report claim.¹²⁵

Of course there are limits to the effectiveness of estoppel based arguments. A final order from an agency, requiring a party to act, es-

119. Estoppel requires "a representation as to a material fact that is contrary to a later asserted position, reliance on that representation, and a change in position detrimental to the party claiming the estoppel." *Florida State Univ. v. Brown*, 436 So. 2d 287, 288 (Fla. 1st Dist. Ct. App. 1983) (per curiam). See Burris, *supra* note 2, at 354-57 (discussion of estoppel cases from 1979-1987).

120. See *Circle K General, Inc. v. Hillsborough County*, 524 So. 2d 1143, 1144 (Fla. 2d Dist. Ct. App. 1988).

121. 521 So. 2d 376 (Fla. 2d Dist. Ct. App. 1988).

122. *Id.* at 377.

123. 516 So. 2d 292 (Fla. 1st Dist. Ct. App. 1987) (per curiam).

124. *Id.* at 295.

125. *Martin v. Monroe County*, 518 So. 2d 934 (Fla. 3d Dist. Ct. App. 1988).

topped an agency from subsequently taking action against the party for doing the required act; but the final order will not prevent another party from bringing a civil action to recover claimed damages suffered from carrying out the required act.¹²⁶

IV. The Administrative Procedure Act¹²⁷

The Administrative Procedure Act was designed "to apply to all agencies unless specifically exempted under the Act."¹²⁸ The APA dictates the processes agencies must follow in exercising their powers. As a result, it is functionally the fundamental law governing most of the administrative agencies in Florida.

As in past years,¹²⁹ the latest sessions of the legislature generated several amendments to the APA. Only two of the amendments are potentially significant.¹³⁰ First, the legislature made clear that the term rule does not include "[s]tatements, memoranda, or instructions to the state agencies issued by the Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by

126. *Accurate Fin. Corp. v. Burman*, 519 So. 2d 689 (Fla. 3d Dist. Ct. App. 1988) (per curiam).

127. Hereinafter APA. FLA. STAT. §§ 120.50-.73 (1987 & Supp. 1988). See *Burris*, *supra* note 2, at 357-81.

In an interesting non-APA case, *Department of Transp. v. Soldovere*, the Florida Supreme Court held that the statutory requirement that a person must give notice to an agency of his claim and the claim must be denied by the agency before a person files a lawsuit against the agency does not change the date the action accrued. FLA. STAT. § 768.28(6) (1987) 519 So. 2d 616 (Fla. 1988). See also *Kropff v. Department of Highway Safety & Motor Vehicles*, 530 So. 2d 304 (Fla. 1988). The court held the notice and denial of claim requirements were mere procedural steps required before the filing of a lawsuit against an agency. These statutory requirements do "not abrogate the general rule that a cause of action accrues when the injury occurs and the damage is sustained," and this is the date to be used in determining if the statute of limitations had expired and what was the appropriate statutory law to apply. *Soldovere*, 519 So. 2d at 617. In this case the use of the date of the injury meant that *Soldovere* did not get the benefit of the increase in statutory liability cap from \$50,000 to \$100,000. Compare FLA. STAT. § 768.28(5) (1979) with FLA. STAT. § 768.28(5) (1981).

128. *Roberson v. Parole & Probation Comm'n*, 444 So. 2d 917, 919 (Fla. 1984). There are two major exceptions, local government agencies and the deputy commissioners, in the workers' compensation system. FLA. STAT. § 120.52(1)(c) (1987).

129. See *Burris*, *supra* note 2, at 357 n.404 (traces the amendments to the APA from 1979-1987); *Fleming and Mallory*, *supra* note 4, at 750-54.

130. The legislature also amended sections 120.53 and 120.575 n.l. FLA. STAT. §§ 120.53 and 120.575 (Supp. 1988).

state agencies to the Comptroller.”¹³¹ Second, the Department of Administration was given new authority to enforce its rules promulgated pursuant to the APA¹³² or section 766.207¹³³ and orders issued by hearing officers. The Department of Administration may now adopt rules “authorizing any reasonable sanctions except contempt for violation of the rules of the division or failure to comply with a reasonable order issued by a hearing officer, which is not under judicial review.”¹³⁴

A. Rules Versus Orders¹³⁵

The dichotomy between a rule and an order established by the APA is significant for two reasons. First, it establishes what procedures an agency must comply with under the APA in taking any action. Second, it shapes the nature of judicial review process of an agency decision. [Further,] [t]his division envisions that agencies will generally develop policies through the rule making process.¹³⁶

While courts have continually reminded agencies that it is preferable to develop policy through the rule making rather than the adjudication process, the courts have continued to approve of virtually all policy development in the adjudication process.¹³⁷ As a result, agencies have virtually unlimited discretion in determining how to proceed in developing policy.¹³⁸

131. *Id.* § 120.52(16)(c)(2) (Supp. 1988).

132. *Id.* §§ 120.53, 120.65(8), (10) (1987 & Supp. 1988).

133. *Id.* § 766.207 (Supp. 1988).

134. *Id.* § 120.65(11).

135. Compare FLA. STAT §§ 120.52(16), 120.54, 120.56 (1987) with FLA. STAT. §§ 120.52(11), 120.57 (1987). See Burris, *supra* note 2, at 362-63; Fleming and Malory, *supra* note 4, at 739-43.

136. Burris, *supra* note 2, at 362 (footnotes omitted).

137. “Administrative agencies are not required to institute rulemaking procedures each time a new policy is developed . . . although that form of proceeding is preferable where established industry-wide policy is being established.” *Florida Cities Water Co. v. Florida Public Serv. Comm’n*, 384 So. 2d 1280, 1281 (Fla. 1980). But see *id.* at 1281-83 (Boyd, J., concurring and dissenting).

138. See, e.g., *Anheuser-Bush, Inc. v. Department of Business Regulation*, 393 So. 2d 1177, 1181-82 (Fla. 1st Dist. Ct. App. 1981).

B. The Rule Making Process¹³⁹

[N]o agency has inherent rulemaking authority, and any rulemaking authority which the legislature may validly delegate to the administrative agency is limited by the statute conferring the power, rulemaking authority may be implied to the extent necessary to properly implement a statute governing the agency's statutory duties and responsibilities.¹⁴⁰ When an agency has rule making authority and has exercised it by properly promulgating rules, then the rules have the same legal 'force and effect' as a statute.¹⁴¹

Section 120.54 of the APA governs the promulgation of the rules by administrative agencies. It must be complied with in all valid exercises of agency rule making authority. Courts have characterized a rule as "an agency statement of general applicability implementing or prescribing agency policy."¹⁴²

But failure to comply with the procedures set forth in the APA should not always result in the agency decision being declared invalid. The APA requirement that an economic impact statement¹⁴³ be made for all proposed rules is fulfilled if it assessed the major benefits and detriments of the proposed rule and provided notice to the public what those benefits and detriments are.¹⁴⁴ Agencies are "not require[d] . . . to specifically identify *every possible* detrimental effect of a proposed rule under *every conceivable* set of circumstances."¹⁴⁵ If an agency fails to comply with the economic impact statement requirement it does not necessarily mandate reversal. Courts should reverse for such an error only if it affected the fairness of the rule making proceeding.¹⁴⁶

139. See Burris, *supra* note 2, at 363-66; Levinson, *supra* note 4, at 634-45.

140. *Fairfield Communities v. Florida Land & Water Adjudicatory Comm'n.*, 522 So. 2d 1012, 1014 (Fla. 1st Dist. Ct. App. 1988).

141. *Williams v. Department of Transp.*, 531 So. 2d 994, 996 (Fla. 1st Dist. Ct. App. 1988).

142. *Department of Transp. v. Blackhawk Quarry Co.*, 528 So. 2d 447, 450 (Fla. 5th Dist. Ct. App. 1988). See FLA. STAT. § 120.52(16) (1987).

143. FLA. STAT. § 120.54(2)(c) (1987).

144. *Department of Admin. v. Herring*, 530 So. 2d 962, 967 (Fla. 1st Dist. Ct. App. 1988). See also *Department of Health & Rehabilitative Servs. v. Wright*, 439 So. 2d 937 (Fla. 1st Dist. Ct. App. 1983).

145. *Herring*, 530 So. 2d at 967 (emphasis in original). See also *Department of Natural Resources v. Sailfish Club, Inc.*, 473 So. 2d 261, 265 (Fla. 1st Dist. Ct. App. 1985), *rev. denied*, 484 So. 2d 9 (Fla. 1986).

146. *Plantation Residents' Assoc., v. School Bd.*, 424 So. 2d 879, 881 (Fla. 1st

C. Adjudicatory Procedures and Structure¹⁴⁷

During the past year the courts decided several cases dealing with the procedures which must be followed by agencies exercising adjudicatory power. Under the APA there is no absolute right to a formal administrative hearing¹⁴⁸ before an agency takes action which determines the "substantial interests of a party."¹⁴⁹ A formal administrative hearing is required only where there is "a disputed issue of material fact."¹⁵⁰ The burden is on the party requesting the formal hearing to demonstrate that a disputed issue of material fact exists.¹⁵¹ If this burden is not carried, the party may still be entitled to an informal hearing.¹⁵² After the hearing has been held, parties are entitled to receive a copy of the hearing officer's recommended order so that they may file written exceptions to it.¹⁵³ These written exceptions may be considered by the agency in determining whether to accept, reject, or modify the hearing officer's recommended order as its final order in the matter.¹⁵⁴ It is reversible error for the agency to fail to serve a party with a copy of the hearing officer's recommended order.¹⁵⁵

Generally, an agency will not grant requests for a new hearing,¹⁵⁶ but the decision in *Cluett v. Department of Professional Regulation*¹⁵⁷ suggests a possible exception. In *Cluett*, the court held that it was im-

Dist. Ct. App. 1982), *rev. denied*, 436 So. 2d 100 (Fla. 1983). *Cf.* *Hewitt Contracting Co. v. Melbourne Regional Airport Auth.* 528 So. 2d 122 (Fla. 5th Dist. Ct. App. 1988) (The court held that agencies soliciting bids have the inherent authority "to waive the irregularity of . . . [a] bid being late and accept the late bid. . .").

147. See Burris, *supra* note 2, at 368-72; Levinson, *supra* note 4, at 558-68.

148. FLA. STAT. § 120.57(1) (1987).

149. *Id.* § 120.57.

150. *Id.*

151. *Village Saloon, Inc. v. Division of Alcoholic Beverages & Tobacco*, 463 So. 2d 278, 284-85 (Fla. 1st Dist. Ct. App. 1985).

152. FLA. STAT. § 120.57(2) (1987).

153. *Id.* §§ 120.57(9), 120.60(3).

154. See *Id.* § 120.57(10).

155. See *Pure Fresh Enter. v. Division of Alcoholic Beverages & Tobacco*, 519 So. 2d 676 (Fla. 1st Dist. Ct. App. 1988) (*per curiam*).

156. In part this may be explained because under the APA the hearing officer has broad authority to grant a stay of an administrative hearing. The decision to grant or deny a stay will be overturned only if it was an abuse of discretion. An abuse of discretion occurs where it is clear the stay was granted based upon a misunderstanding of what the applicable substantive statutes required. *Department of Professional Regulation v. Stern*, 522 So. 2d 77, 78-79 (Fla. 1st Dist. Ct. App. 1988).

157. 530 So. 2d 351 (Fla. 1st Dist. Ct. App. 1988).

proper for the Department of Professional Regulation to refuse to hear new evidence which was unavailable at the original hearing when a case was remanded from the district court of appeal explicitly for that purpose. The court noted that the Department has substantial discretion to grant or refuse a request for a new hearing based on newly discovered evidence.¹⁵⁸ But the decision to not grant a second hearing so the new evidence could be presented is reviewable by the courts and will be reversed where, as in this case, the decision was "arbitrary and unreasonable and the result of an abuse of discretion."¹⁵⁹

1. Contract Bidding

In *Department of Transportation v. Groves-Watkins Constructors*,¹⁶⁰ the Florida Supreme Court reaffirmed¹⁶¹ that in competitive bidding agencies have "broad discretion . . . and . . . that an agency's decision based upon an honest exercise of this discretion cannot be overturned absent a finding of 'illegality, fraud, oppression or misconduct.'"¹⁶² Where an agency rejects all the bids submitted, as in this case, the courts under this standard of judicial review should overturn the agency's decision only if it finds this decision was reached in order "to defeat the object and integrity of competitive bidding."¹⁶³ When the agency rejects all bids received because the bids were substantially in excess of the agency's pre-bid estimate, the agency has acted appropriately, and the courts should not overturn the agency's decision.¹⁶⁴

158. The burden is on the movant in such cases to demonstrate that the new evidence would "probably change the outcome of" the hearing and "that the new evidence was not discoverable before trial by the exercise of due diligence." *Id.* at 355. See also *Department of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st Dist. Ct. App. 1981).

159. *Cluett*, 530 So. 2d at 356.

160. 530 So. 2d 912 (1988).

161. In doing so the court reaffirmed the result in *Liberty County v. Baxter's Asphalt & Concrete, Inc.* 421 So. 505 (Fla. 1982).

162. *Groves-Watkins*, 530 So. 2d at 913 (quoting *Liberty County v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 505 (Fla. 1982)). Later in the opinion the court characterized the standard of review the hearing officer should use in evaluating a protest of a decision to not accept any of the bids as focusing on "whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly." *Id.* at 914.

163. *Id.* at 913.

164. *Id.* at 914. The court also noted that it was inappropriate for a hearing officer to reject the agency's prebid estimate as the basis for making this determination absent a showing that the agency prebid estimate was made in "bad faith . . . [and

Problems have arisen where an agency failed to comply with the contract bidding procedures in the APA. The APA requires that agencies give notice of the protest procedures to bidders on a contract.¹⁶⁵ "The failure to include the statutory notice, or words of substantially similar effect," deprived the rejected bidders of the opportunity to enter the administrative process with a bid protest.¹⁶⁶ In such cases the bid protest must be allowed¹⁶⁷ even though normally it would have been waived.¹⁶⁸ The court in *Capital Copy, Inc. v. University of Florida*,¹⁶⁹ found this result was required by section 120.68(8).¹⁷⁰

But in *Caber Systems, Inc. v. Department of General Services*,¹⁷¹ the court affirmed the Department of General Services's decision to reject "all bids for the 1987 State micro-computer term purchasing contracts and extending the previous year's contracts" after it received a bid protest,¹⁷² even though the Department "fail[ed] to follow the time limits prescribed in section 120.53(5)."¹⁷³ The Department rejected the bids because it concluded "that the invitation to bid was ambiguous

could] be deemed arbitrary or capricious." *Id.*

165.

The agency shall provide notice of its decision or intended decision concerning a bid solicitation or contract award. The notice required by this paragraph shall contain the following statement: "Failure to file a protest within the time prescribed in s. 120.53(5), Florida Statutes, shall constitute a waiver of proceedings under chapter 120, Florida Statutes.

FLA. STAT. § 120.53(5)(a)(2) (1987). A bidder must file written notice of intent to protest the bid within seventy-two hours after the posting of the bid or receipt of the agency decision or intended decision, and file a written protest within ten days after the filing of the protest notice. FLA. STAT. § 120.53(5)(b) (1987).

166. *Capital Copy, Inc. v. University of Fla.*, 526 So. 2d 988, 988 (Fla. 1st Dist. Ct. App. 1988).

167. *Id.* at 989. See also *Northrop & Northrop Bldg. Partnership v. Department of Correction*, 528 So. 2d 1249, 1250 (Fla. 1st Dist. Ct. App. 1988).

168. FLA. STAT. § 120.53(5)(b) (1987).

169. 526 So. 2d 988 (Fla. 1st Dist. Ct. App. 1988).

170. FLA. STAT. § 120.68(8) (1987).

171. 530 So. 2d 325 (Fla. 1st Dist. Ct. App. 1988).

172. *Id.* at 326. In order for a bid protest to be properly filed the protestor must have standing and have acted in a timely fashion. See *Kirkland, Standing in Bid Protests*, 62 FLA. B.J. 41 (July/August 1988).

173. *Caber Systems*, 530 So. 2d at 326. But see *id.* at 339-40 (Booth, J., dissenting) (Judge Booth argued that the majority's approach is in direct contravention of the purpose of the statutory provisions concerning bidding.). FLA. STAT. § 120.53(5)(e) (1987) requires that bid protests be heard within fifteen days after receipt of the bid protest.

and substantially flawed."¹⁷⁴ Caber Systems protested this decision. The Department rejected the protest after an administrative hearing.¹⁷⁵ The court held that section 120.53(5), which provided that after a protest was filed the Department must stop the bid solicitation or contract award process until it resolves the protest, did not prohibit the Department from rejecting all bids as was done in this case. It only prevented the Department from proceeding with the process "leading toward the award of any contract to other bidders."¹⁷⁶ The Department does not have unfettered discretion in reaching such a radical decision. The decision to reject all the bids "must be founded upon a rational basis and not be arbitrary"¹⁷⁷ in order to protect against a subversion of the bidder/protestor's right to a hearing under the APA.¹⁷⁸ The Department delayed acting on the bid protests in a timely fashion, but the court held this delay was not reversible error.¹⁷⁹ In order for an agency error to merit reversal, the court must find the error was "material, and if so, whether it . . . impaired the fairness of the proceeding or the correctness of the action."¹⁸⁰ The APA provides that a violation of the procedures mandated by section 120.53 is "presumed to be a material error in procedure."¹⁸¹ The court, focusing on the word presumed, concluded that the court could find in certain circumstances that the presumption of procedural error had been overcome. What must be shown is that the violation was harmless error. In this case, the violation of the time requirements was harmless error because it would "serve no useful purpose"¹⁸² to reverse the Department's decision as the decision to reject all the bids was based upon valid grounds supported by competent, substantial evidence - the ambiguity in the bid invitations, and because only those bidders who had dealt with the Department in the past could properly interpret it.¹⁸³

174. *Caber Systems*, 530 So. 2d at 326.

175. *Id.*

176. *Id.* at 336.

177. *Id.* See *supra* text accompanying notes 166-70.

178. *Id.* at 336-38.

179. *Id.* at 338; FLA. STAT. § 120.68(8) (1987).

180. *Caber Systems*, 530 So. 2d at 338.

181. *Id.* FLA. STAT. § 120.68(8) (1987).

182. *Caber Systems*, 530 So. 2d at 338.

183. *Id.* at 338-39.

2. *Certificate of Need*

In recent years there has been numerous cases litigating the administration of the certificate of need system governing the licensing the health care facilities.¹⁸⁴ This process continued during this past year. In *Beverly Enterprises-Florida, Inc. v. Department of Health & Rehabilitative Services*,¹⁸⁵ the court held that the appropriate way for a subsequent applicant for a certificate of need for nursing home facilities to assure it receives a comparative hearing with prior applicants to serve the same area is to petition to intervene in the hearing on the earlier applications for certificates of need. The subsequent applicant can not sit back and await the decision on the earlier applications for certificate of need and then claim HRS must treat the subsequent application in a manner that ignores the earlier certificates of need which were granted. If this were permitted, it would allow subsequent applicants to force the HRS to grant certificates of need where no need exists.¹⁸⁶

In *A Professional Nurse, Inc. v. Department of Health & Rehabilitative Services*,¹⁸⁷ a hearing officer prohibited A Professional Nurse, Inc.¹⁸⁸ "from presenting any testimony or evidence at the hearing" on Professional Nurse's and the others' certificate of need applications.¹⁸⁹ As a result of being prohibited from presenting evidence at the hearing, the hearing officer issued a recommended order, which was adopted as HRS's final order, denying Professional Nurse's application for a certificate of need because it had not offered any evidence in support of its application and "had failed to sustain its burden of proof of entitlement to" the certificate of need.¹⁹⁰ On appeal, the First District Court of Appeal reversed. The court noted it is clear that the hearing officer may impose sanctions on a party for failing to comply with discovery orders.¹⁹¹ But the hearing officer in this case over stepped the bounds of

184. See Burris, *supra* note 2, at 378-81.

185. 527 So. 2d 218, 221 (Fla. 1st Dist. Ct. App. 1988).

186. *Id.* at 221.

187. 519 So. 2d 1061 (Fla. 1st Dist. Ct. App. 1988).

188. Hereinafter Professional Nurse.

189. *Professional Nurse*, 519 So. 2d at 1063.

190. *Id.*

191. *Id.* at 1064. "An agency or its duly empowered presiding officer or hearing officer has the power . . . to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure, including the imposition of sanctions." FLA. STAT. § 120.58(1)(b) (1987).

his authority by imposing a too severe sanction. The prohibition on presenting evidence was the functional equivalent of dismissing Professional Nurse's application for a certificate of need. This was an abuse of discretion by the hearing officer, because a formal or functional dismissal of an application for a certificate of need should be imposed "only in the most exceptional cases" for violating a discovery order, and this is not one.¹⁹²

D. Licensing¹⁹³

In *Alterman Transport Lines, Inc. v. Department of Transportation*,¹⁹⁴ the court ruled on the issue of whether the application for a tandem trailer truck route must be granted because the Department of Transportation "failed to render an order approving or denying the route [request] within the statutorily mandated time established" by the APA?¹⁹⁵ The outcome on this issue depended on whether the Department process was a licensing proceeding¹⁹⁶ or a regular order proceeding.¹⁹⁷ Because the court held the application process was not a licensing proceeding, the Department's order was entered in a timely fashion under the rules governing order proceedings. The APA defines a license as "a franchise, permit, certification, registration, charter, or similar form of authorization required by law."¹⁹⁸ The court read this as requiring the grant of a privilege by the state which was personal in nature to an individual or a corporation.¹⁹⁹ The granting of an application for the use of a particular pre-existing road by a certain type of truck is not a license because it seeks only "the approval of the route

See *Russo v. Department of Health & Rehabilitative Servs.*, 451 So. 2d 979 (Fla. 1st Dist. Ct. App. 1984) (per curiam); Donnelly, *The Use of Expert Witnesses in Administrative Hearings*, 62 FLA. B.J. 35 (December 1988) (discussion of discovery problems with expert witnesses).

192. *Professional Nurse*, 519 So. 2d at 1064. The court also noted it would have reversed the decision of HRS in this case because HRS had not adopted a valid rule establishing a methodology for determining whether a certificate of need application should be granted or denied. *Id.* at 1064-5.

193. See Levison, *supra* note 4, at 668-71.

194. 519 So. 2d 1005 (Fla. 1st Dist. Ct. App. 1987).

195. *Id.* at 1006. See FLA. STAT. § 120.60(2) (1987).

196. FLA. STAT. § 120.60 (1987).

197. *Id.* § 120.58.

198. *Id.* § 120.52(9).

199. *Alterman*, 519 So. 2d at 1007.

which is sought, not the permitting of specific trucking lines.”²⁰⁰ Once the route is approved for a certain type of truck, then it could be used in some circumstances by other trucking companies with that type of truck. It is not an approval exclusive to the company which originally applied for approval of the route. Such a system of approving routes does not have the necessary exclusive personal character of a license.²⁰¹

E. What Counts as Evidence in an Administrative Proceeding?²⁰²

The APA vests hearing officers with considerable discretion in determining what evidence should be admitted at a hearing.²⁰³ But this discretion is not without limits. In *Halpin v. Unemployment Appeals Commission*,²⁰⁴ the court held that the appeals referee, in an unemployment benefits case, committed a material error²⁰⁵ in “permit[ing] the employer’s representative to testify concerning information in records that the employer refused to make available to” the benefit applicant.²⁰⁶ While the court implicitly agreed that the appeals referee correctly refused to issue a subpoena for employer records and witnesses, which were located out-of-state, that did not end the matter.²⁰⁷ The appeals referee, in the interest of fairness,²⁰⁸ should have excluded the employer from testifying about information contained in these out-of-state records unless the applicant for benefits was given an opportunity to examine those records.²⁰⁹

In *Department of Highway Safety & Motor Vehicles v. Corbin*,²¹⁰ the court confronted the issue of whether the statutory accident report

200. *Id.* at 1008 (emphasis in original).

201. *Id.* The court also found this conclusion supported by the Regulatory Reform Act and DOT’s regulations. *Id.* at 1008-09.

202. In order to properly preserve the issue of whether a hearing officer improperly failed to admit evidence into the record the party must make an appropriate proffer of the evidence. If a proffer is not made then the issue is waived. *Berry v. Department of Envtl. Regulation*, 530 So. 2d 1019, 1022 (Fla. 4th Dist. Ct. App. 1988).

203. FLA. STAT. § 120.58(1)(a) (1987).

204. 516 So. 2d 1027 (Fla. 1st Dist. Ct. App. 1988).

205. FLA. STAT. § 120.68(8) (1987).

206. *Halpin*, 516 So. 2d at 1029.

207. *Id.* at 1028. *Cf. Nach v. Department of Professional Regulation*, 528 So. 2d 908 (Fla. 2d Dist. Ct. App. 1988) (upholding issuance of subpoena).

208. FLA. STAT. § 120.68(8) (1987).

209. *Halpin*, 516 So. 2d at 1029.

210. 527 So. 2d 868 (Fla. 1st Dist. Ct. App. 1988).

privilege²¹¹ barred the use of a state trooper's report of his own accident against him in disciplinary proceedings held by the Public Employees Relations Commission.²¹² The Department of Highway Safety and Motor Vehicles determined based upon information given by Officer Corbin at the scene of the accident to the officer who investigated the accident that it was caused by his driving too fast for the conditions. Officer Corbin requested an administrative hearing to review the decision. He prevailed in the administrative hearing process, at least in part, because his report of the accident was excluded from the record based upon the accident report privilege statute.²¹³ The court held that the Public Employees Relations Commission properly excluded the accident report based upon the statutory privilege because the Model Rule contained in the Administrative Code²¹⁴ required it to recognize all privileges recognized in civil lawsuits. This result the court noted, in *dicta*, was also consistent with the legislative purpose of the privilege - "to encourage people to make a true report of the accident in order to facilitate the ascertainment of the cause of the accidents, thus furthering the state's ultimate goal of making the highways safer for all of society."²¹⁵

1. Hearsay²¹⁶

Courts continue to be troubled by the much more liberal rule con-

211.

Each accident report made by a person involved in an accident shall be without prejudice to the individual so reporting and shall be for the confidential use of the department or other state agencies having use of the records for the accident prevention purposes. No such report shall be used as evidence in any trial, civil or criminal, arising out of an accident.

FLA. STAT. § 316.066(4) (Supp. 1988).

212. *Corbin*, 527 So. 2d at 870.

213. *Id.* The scope of the accident report privilege is limited as it only "attaches to that part of the officer's written report or testimony which was obtained by him from a person who was required to make a report" of the accident. It does not cover statements made by other witnesses or the observations of the officer. *Spurlin v. Scheiner*, 531 So. 2d 988, 989 (Fla. 2d Dist. Ct. App. 1988).

214. FLA. ADMIN. CODE ANN. r. 28-5.304 (1988).

215. *Corbin*, 527 So. 2d at 871. The court also noted that this interpretation of the privilege assured that the statutory requirement that drivers report accidents that they are involved in did not run afoul the privilege against self-incrimination. *Id.* at 871-72.

216. See *Burris*, *supra* note 2, 366-68.

cerning the use of hearsay evidence in administrative formal proceedings under section 120.57.²¹⁷ Typical of how courts have misread the hearsay rules for administrative hearings is *Juste v. Department of Health & Rehabilitative Services*.²¹⁸ In *Juste*, the court viewed the APA authorization for the use of hearsay evidence²¹⁹ as limited in scope. The court opined that hearsay evidence in an administrative hearing "must be offered in strict compliance with the requirements of the particular [hearsay] exception"²²⁰ found in the statutory Evidence Code.²²¹ This is a misreading of the more liberal policy toward hearsay evidence adopted by section 120.58(1)(a).²²²

The correct way to approach the question of the use of hearsay evidence in administrative proceedings is found in *Florida Mining & Materials Corp. v. Unemployment Appeals Commission*.²²³ In *Florida Mining & Materials Corp.*, the court properly noted that, while hearsay is only admissible in trials over objection when it falls within one of the statutory exceptions to the inadmissibility of hearsay evidence,²²⁴ in administrative hearings governed by the APA, hearsay evidence not within any of the statutory exceptions is admissible if it is relevant, material, and not unduly repetitious and is offered to supplement or explain other evidence in the record.²²⁵ The court held that the appeals referee in this case committed reversible error in excluding hearsay evidence offered for that purpose.²²⁶ Of course, if the evidence qualifies for admission under one of the hearsay exceptions,²²⁷ then the limitation on its use in creating substantial, competent evidence to support an agency's decision²²⁸ is not applicable.²²⁹

217. See FLA. STAT. § 120.58(1)(a) (1987).

218. 520 So. 2d 69 (Fla. 1st Dist. Ct. App. 1988).

219. FLA. STAT. § 120.58(1)(a) (1987).

220. *Juste*, 520 So. 2d at 71-72.

221. FLA. STAT. § 90.803 (1987).

222. *Id.* § 120.58(1)(a).

223. 530 So. 2d 426 (Fla. 1st Dist. Ct. App. 1988).

224. *Id.* at 427. See generally Dobson, *Evidence, 1987 Survey of Florida Law*, 12 NOVA L. REV. 461, 521-46 (1987).

225. FLA. STAT. § 120.58(1)(a) (1987). See *Florida Mining & Materials, Corp.*, 530 So. 2d at 427.

226. *Florida Mining & Materials, Corp.*, 530 So. 2d at 428.

227. FLA. STAT. §§ 90.802-.805 (1987).

228. *Id.* § 120.58(1)(a).

229. *Wright v. Department of Educ.*, 523 So. 2d 681, 682 (Fla. 1st Dist. Ct. App. 1988); *Spicer v. Metropolitan Dade County*, 458 So. 2d 792, 794 (Fla. 3d Dist. Ct. App. 1984) (The court correctly noted that if the hearsay evidence was admissible

F. Final Agency Action²³⁰

Generally, courts will not review nonfinal agency decisions.²³¹ During this past year there were no cases concerning this typical aspect of the question of what constitutes final agency action. Rather the courts dealt with an unusual aspect of the finality question: what power does an agency retain over a case after it has issued its final order?²³²

In *Taylor v. Department of Professional Regulation*,²³³ the Florida Supreme Court held that an agency acting in its quasi-judicial capacity to revoke a license has authority to modify or change its final order to correct clerical errors and inadvertent mistakes. The court read Rule 9.020(g) of the Florida Rules of Appellate Procedure as authorizing agencies in this circumstance to entertain a motion to amend or alter the order.²³⁴ Agencies acting in their quasi-judicial capacity have inherent authority to grant such a motion only "to correct its own orders which contain clerical errors and errors arising from mistake or inadvertence."²³⁵ A motion to amend or alter an agency order in this circumstance is timely filed if it is filed within thirty days of the entry of the final order. The court noted that the time for filing a petition for judicial review is not tolled by the filing of a motion to alter or amend, but if the motion is granted, then the date of the altered or amended

under one of the hearsay exception then it could by itself constitute competent substantial evidence.).

230. See Burris, *supra* note 2, at 374-76.

231. E.g., *Department of Professional Regulation v. Smith*, 451 So. 2d 872, 873 (Fla. 1st Dist. Ct. App. 1984) (clarified). But see *Denney v. Conner*, 462 So. 2d 534, 535 (Fla. 1st Dist. Ct. App. 1985) (per curiam).

232. In another unusual case, the court held that once a hearing officer heard all the evidence and reached his factual conclusions the time passed when a party can voluntarily withdraw an application before the agency. The agency can proceed and issue a final order even if the party does not participate in the remaining steps in the administrative process. *Middlebrooks v. St. Johns River Water Management Dist.*, 529 So. 2d 1167, 1169-70 (Fla. 5th Dist. Ct. App. 1988).

233. 520 So. 2d 557 (Fla. 1988).

234. "Where there has been filed in the lower tribunal an authorized and timely motion . . . to alter or amend . . . the order shall not be deemed rendered until disposition thereof. FLA. R. APP. P. Rule 9.020(g). The court emphasized that nothing in this rule authorized agencies to receive or grant the much broader in scope motion for rehearing. *Taylor*, 520 So. 2d at 560. Justice Grimes in his concurring opinion questioned whether a proper motion to alter or amend was filed in this case, but as the Department of Professional Regulation treated it as such he was willing to accept. *Id.* at 561 (Grimes, J., concurring).

235. *Taylor*, 520 So. 2d at 560.

final order is the measuring date for purposes of determining whether the petition for judicial review was filed in a timely fashion.²³⁶

While *Taylor* is a sound decision, it creates potential pitfalls for the unwary advocate. First, if an attorney files a petition for judicial review, then the agency is deprived of its power to alter or amend because jurisdiction has passed from the agency to the courts.²³⁷ In such a case, the only way to correct the agency's final order is to "request the reviewing body to relinquish jurisdiction to allow the agency" to correct its final order to eliminate the clerical error in the final order.²³⁸ Second, if the motion to alter or amend is filed with the agency but not granted, then *Taylor* indicates that the date for measuring when the petition for judicial review must be filed is the date of the original order.²³⁹ This means that many times there may be very little or no time left for the filing of the petition for judicial review once the denial of the motion to alter or amend is received. The timing of the agency's decision in *Taylor* is an example. The original final order was entered on June 26, 1985, but the agency's amended final order was not filed until August 8, 1985, past the deadline for filing the petition for judicial review based upon the original final order. If the agency had denied the motion to amend or alter filed by Taylor and if Taylor had waited for the agency's decision, then he would have been barred from seeking judicial review. The net result is that lawyers must be prepared to file the petition for judicial review based upon the original final order because it must be filed within thirty days of the original final order, unless the agency granted the motion to alter or amend. If lawyers are not so prepared, then they court the risk that the right to judicial review will be lost if the motion to alter or amend is not granted. Of course, this problem is avoided if agencies expeditiously decide motions to alter or amend final orders.

G. An Agency Must Follow Its Own Rules

It is implicit in the structure of the APA that in exercising their powers agencies are required to follow their own rules and orders as

236. *Id.*

237. See *Taylor*, 520 So. 2d at 560 (by implication). Cf. *Florida Admin. Comm'n. v. District Ct. App.*, 351 So. 2d 712 (Fla. 1977) (considering this issue in the context of rule making).

238. *Taylor*, 520 So. 2d at 560.

239. This point was emphasized by Justice Grimes in his concurring opinion. *Id.* at 561 (Grimes, J., concurring).

well as statutes.²⁴⁰ "[W]hen an administrative board fails to follow its mandated conduct, the appropriate procedure is to require that . . . [the agency] conduct its business as required by its enabling legislation."²⁴¹ In *Buckley v. Department of Health & Rehabilitative Services*,²⁴² the Department of Health and Rehabilitative Services²⁴³ denied Buckley's application for aid to families with dependent children because she owned equity in a piece of real property, and this disqualified her under the eligibility requirements. The court held that HRS erred in denying benefits because HRS failed to inform Buckley that she could exclude her interest in real estate from the eligibility determination for six months, if she made a good faith effort to sell her interest in the property.²⁴⁴ The court, relying on *Pond v. Department of Health & Rehabilitative Services*,²⁴⁵ found that the six month grace period created by the administrative regulation was expressed in mandatory language and required HRS to inform an applicant in Buckley's position of this option for satisfying the requirements for benefits eligibility.²⁴⁶ In *Sims v.*

240. In *Florida State Bd. of Education v. Brady*, 368 So. 2d 661, 662-63 (Fla. 1st Dist. Ct. App. 1979), the court held that the legislature had vested authority in the Commissioner of Education to determine the minimum proficiency standards in the functional literacy test for high school students. The decision process of the Commissioner in adopting these standards was not subject to the standards and procedures of the APA rule making process, but once established by the Commissioner these standards are rules. See *Burris*, *supra* note 2, at 380.

241. *Broward County Human Rights Bd. v. Rimon Apartments*, 526 So. 2d 773, 774 (Fla. 4th Dist. Ct. App. 1988) (The Board failed to hold a hearing on a complaint as required by statute.). See *McGaw v. Metropolitan Dade County*, 529 So. 2d 1190 (Fla. 3d Dist. Ct. App. 1988).

242. 516 So. 2d 1008 (Fla. 1st Dist Ct. App. 1987).

243. Hereinafter HRS.

244. The "rule authorizes the payment of benefits during that six months period, provided the family 'sign an agreement to dispose of the property and to repay the amount of aid received during the period that would not have been paid had the property been sold at the beginning of such period,' but not exceeding the net proceeds of such sale, if consummated." *Buckley*, 516 So. 2d at 1010 (quoting 45 C.F.R. § 206.10(a)(2)(i) (1987)).

245. 503 So. 2d 1330 (Fla. 1st Dist. Ct. App. 1987). In this case the court read *Pond* as holding that the federal and state regulations in these programs "require that the applicants shall be fully informed of eligibility requirements so they may change their circumstances sufficiently to comply with such requirements." *Buckley*, 516 So. 2d at 1010. Judge Pearson in his dissenting opinion disagreed with such a broad reading of the decision in *Pond*. *Id.* (Pearson, J., dissenting).

246. *Id.* The court rejected the defense that the case worker was not aware of the regulation. *But cf.* *Schweiker v. Hansen*, 450 U.S. 785 (1981) (permitting such a defense if the policy at issue was not an official regulation).

Dugger,²⁴⁷ the court held that the Department of Corrections must follow its own regulations and allow a prisoner in some circumstances to call material witnesses to testify at his administrative disciplinary hearing.²⁴⁸ The burden was on the Department of Corrections to state in the record the reasons why it did not call the witnesses so a reviewing court could determine if the Department had complied with its rules concerning the calling of witnesses. In this case the court reversed because the record did not contain any information explaining why the witnesses were not called.²⁴⁹

This is not meant to forever hinder agencies from changing their positions, but it does require an adequate explanation to justify such changes. In *Health Care & Retirement Corp. v. Department of Health & Rehabilitative Services*,²⁵⁰ Judge Ervin pointed out that where an agency departs from its prior practices concerning the interpretation of its rules, the agency must adequately explain "its deviation from prior agency practice."²⁵¹ If the agency does not adequately explain its deviation, then the reviewing court should remand the case to the agency for such an explanation.²⁵² If no adequate explanation is offered, then the agency's decision must be reversed.

V. Public Records Act²⁵³

The purposes of the Public Records Act are to promote access to public records, to help maintain an open government, and to protect the freedoms of all citizens and residents.²⁵⁴ To these ends courts traditionally read the exemption provisions of the Public Records Act very nar-

247. 519 So. 2d 1080 (Fla. 1st Dist. Ct. App. 1988).

248. currently codified at FLA. ADMIN. CODE ANN., rr. 33-22.005(4)(b).007(1), .007(2)(a-f) (1989).

249. *Sims*, 519 So. 2d at 1082.

250. 516 So. 2d 292 (Fla. 1st Dist. Ct. App. 1987) (per curiam).

251. *Id.* at 299 (Ervin, J., concurring and dissenting).

252. *Id.*

253. FLA. STAT. §§ 119.01-.14 (1987). See Burris, *supra* note 2, at 382-84; Peltz, *Use of the Florida Public Records Act as a Discovery Tool in Tort and Administrative Litigation Against the State*, 39 U. MIAMI L. REV. 291 (1985). Cf. Flynn, *Discoverability of Hospital Incident Reports and Taxing Expert Witness Fees in Medical Malpractice Litigation in Florida: Plaintiff's Perspective*, 13 NOVA L. REV. 189 (1988).

254. *Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d Dist. Ct. App. 1985) (per curiam) (The court noted that purpose of the request for access to the records was "immaterial" in determining if it should be granted.).

rowly.²⁵⁵ The power of these perspectives can be seen in cases dealing with the Public Records Act and the criminal justice system. In *Downs v. Austin*,²⁵⁶ the court held that the Public Records Act required that the State Attorney's Office must release the records of four polygraph tests administered to a witness in a murder case. The exemption from disclosure for "criminal intelligence and criminal investigative information"²⁵⁷ is designed to exclude from disclosure only legitimate law enforcement secrets related to present or future criminal activity.²⁵⁸ In this case, the records must be release because the defendant in the murder case had already been convicted and there was no on-going criminal investigation which was threatened by the disclosure of the polygraph records.²⁵⁹ Further, information which had been released to the public, as in this case, was no longer protected from disclosure even if one of the exemptions applied. The public disclosure destroyed any "purpose . . . served by preventing full access to the desired documents or information."²⁶⁰ In *Coleman v. Austin*,²⁶¹ the court held that the concept of a public record did "not include materials prepared as preliminary drafts or notes, [but] inter-office and intra-office memoranda which formalize knowledge and communicate information between public employees may constitute public records."²⁶² A state attorney's notes to himself made for his personal use and not as inter-office or intra-office memoranda are not public records. But if these notes were prepared as inter-office or intra-office memoranda, then the notes are public records "even though encompassing trial preparation

255. *Downs v. Austin*, 522 So. 2d 931, 933-34 (Fla. 1st Dist. Ct. App. 1988). See also *Forsberg v. Housing Authority*, 455 So. 2d 373, 374 (Fla. 1984) (refusing to find a general right to privacy restricted disclosure requirements of the statute); *Miami Herald Publishing Co. v. City of North Miami*, 452 So. 2d 572, 573 (Fla. 3d Dist. Ct. App. 1984) (refused to imply an additional exemption based upon the Evidence Code); *Spurlin v. Scheiner*, 531 So. 2d 988, 989 (Fla. 2d Dist. Ct. App. 1988) (requiring disclosure of those portions of an accident report not covered by the accident report privilege). But see *Times Publishing Co. v. Patterson*, 451 So. 2d 888, 891 (Fla. 2d Dist. Ct. App. 1984) (implicitly recognizing that the constitutional right to a fair trial may impose a nonstatutory exemption on the operation of the Public Records Act).

256. 522 So. 2d 931 (Fla. 1st Dist. Ct. App. 1988).

257. FLA. STAT. § 119.07(3)(j) (1987).

258. *Downs*, 522 So. 2d at 934.

259. This same analysis applies to the exemption contained in FLA. STAT. § 119.011(3)(b) (1987). *Downs*, 522 So. 2d at 934.

260. *Downs*, 522 So. 2d at 935.

261. 521 So. 2d 247 (Fla. 1st Dist. Ct. App. 1988).

262. *Id.* at 248.

materials."²⁶³

A party who was improperly denied access to public records and who successfully sued to gain access was entitled to "the reasonable costs of enforcement including reasonable attorneys' fees."²⁶⁴ In *News & Sun-Sentinel v. Palm Beach County*,²⁶⁵ the court reversed the circuit court's decision denying attorney fees in an action to enforce the Public Records Act. The circuit court had refused to award attorney fees because the agency's refusal to disclose the information requested by the News and Sun-Sentinel was done in good faith.²⁶⁶ The Fourth District Court of Appeal reversed. It held that an agency which unlawfully²⁶⁷ withheld public records under the Public Records Act must pay "the reasonable costs of enforcement including reasonable attorneys' fees."²⁶⁸ This requirement recognizes no good faith or honest mistake exception to the requirement that attorney fees be paid where the agency unlawfully withheld the requested records.²⁶⁹

In *Davis v. Sarasota County Public Hospital Board*,²⁷⁰ the court

263. *Id.*

264. FLA. STAT. § 119.12(1) (1987).

265. 517 So. 2d 743 (Fla. 4th Dist. Ct. App. 1987).

266. *Id.* at 743-44.

267. The legislature amended the Public Records Act in 1984 to authorize payment of attorneys' fees when the agency denial of access was held to be unlawful. Prior to 1984, attorneys' fees awards were authorized only when the agency's refusal to disclose the requested records was unreasonable. *Id.* at 744.

268. FLA. STAT. § 119.12(1) (1987).

269.

The attorneys' fees provision may be viewed by the records keeper as a penalty for noncompliance. In one sense this is accurate and thus it may have a tendency to motivate the records holder to be more responsive and careful when a request for disclosure is made. It is at the same time a means of compensating members of the public where a request for disclosure is frustrated when no specific exemption is involved. Clarification of a particular applications of the public records law accrues to the benefit of the agency and the public. It is appropriate that a member of the public commencing litigation to enforce disclosure and whose right to disclosure is ultimately vindicated by the court order at least have his attorneys' fees reimbursed for that endeavor.

News and Sun-Sentinel, 517 So. 2d at 744.

This approach to giving full force and effect to the Public Records Act attorneys' fees provision is sharply at variance with the traditional hostility to and narrow reading of such statutes. "[S]ince statutes authorizing an award of attorneys' fees are in derogation of the common law, they must be strictly construed." *Certain Lands v. City of Alachua*, 518 So. 2d 386, 388 (Fla. 1st Dist. Ct. App. 1987).

270. 519 So. 2d 75 (Fla. 2d Dist. Ct. App. 1988).

noted that it is inappropriate to grant a party attorneys' fees under the Public Records Act²⁷¹ where that party did not prevail in court on any of his claims. In holding that Davis was not a prevailing party, the court adopted a very formalistic view of what satisfies this requirement. The court required that there must be an order entered by a court directing the disclosure of records withheld. There was no such order in this case; therefore Davis was not a prevailing party.²⁷²

In *Brunson v. Dade County School Board*,²⁷³ the court determined what constituted refusal to produce a requested public record.²⁷⁴ In *Brunson*, the court held that "unjustified delay²⁷⁵ in complying with the requests until after a suit was brought amounted to an 'unlawful refusal' under . . . [the Public Records Act] for which attorney's fees and costs are to be awarded."²⁷⁶

VI. Judicial Review²⁷⁷

"[R]egardless of whether . . . [the court] agree[d] with the final

271. FLA. STAT. § 119.12(1) (1983).

272. *Davis*, 519 So. 2d at 76.

273. 525 So. 2d 933 (Fla. 3d Dist. Ct. App. 1988) (per curiam).

274. FLA. STAT. § 119.07(2) (1987).

275. In this case the Dade County School Board did not release the records for fifty-eight days, and only released them at the end of that period after a suit was filed. *Brunson*, 525 So. 2d at 934.

276. *Id.*

277. "The standard of [judicial] review is the keystone of appellate decision making. When I start to read the briefs, the first question I ask is 'what is the standard of [judicial] review?'" Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 437 (1986) (It was his fifth sin) (Judge Pregerson serves on the United States Court of Appeal for the Ninth Circuit.)

See *Burris*, *supra* note 2, at 384-417; Fleming and Mallory, *supra* note 4, at 744-50; England and Levinson, *supra* note 4, at 775-80; Levinson, *supra* note 4, at 678-89.

The standard of judicial review is also very important in other contexts besides administrative law. See, e.g., *Collins v. Collins*, 519 So. 2d 729, 730 (Fla. 2d Dist. Ct. App. 1988) ("[G]ross abuse of discretion must be shown before this court may reverse the denial of a motion to vacate a default judgment."); *Department of Transp. v. Raiche*, 527 So. 2d 842, 845 (Fla. 2d Dist. Ct. App. 1988) ("[I]t is not the function of the appellate court to reevaluate the evidence and substitute its judgment for that of the jury. If there is any competent evidence to support a verdict, the verdict must be sustained regardless of this court's opinion its propriety. [A] verdict cannot be affirmed where there is no rational predicate for it in the evidence."); *Florida Bar v. Aaron*, 528 So. 2d 685, 686 (Fla. 1988) ("A referee's findings of fact are not subject to attack unless they are without support in the evidence. [T]he referee's finding of fact . . . is entitled to a presumption of correctness which will be upheld absent a showing that the

agency actions, . . . [it is] statutorily prevented from changing the outcome where substantial, competent evidence supports the findings of fact and the agency correctly applied the statutory criteria."²⁷⁸ This is a succinct general statement of the judicial review paradigm established by the APA.²⁷⁹ Critical to the APA judicial review process is the distinction between questions of fact and questions of law.²⁸⁰

The APA adopted as a general principle a perspective which prohibits a reviewing court from generally substituting its judgment for that of an agency on both questions of law and fact.²⁸¹ Under this approach, courts should generally defer to agency decisions in both areas.²⁸² Under the APA the reviewing court should not substitute its

finding is clearly erroneous."); *Collins v. School Bd.*, 471 So. 2d 560, 563 (Fla. 4th Dist. Ct. App. 1985).

278. *City of Lake Wales v. Public Employees Relations Comm'n*, 402 So. 2d 1224, 1225 (Fla. 2d Dist. Ct. App. 1981).

279. See Burris, *supra* note 2, at 396-97.

280. "The reviewing court shall deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated discretion." FLA. STAT. § 120.68(7) (1987). Compare FLA. STAT. § 120.68(9) (1987) with FLA. STAT. § 120.68(10) (1987). Of course, "[t]he distinction between law and fact is . . . not [always] easy to discern." Burris, *supra* note 2, at 395. See L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).

While no cases during the past year illustrate it, a second dichotomy which may effect the standard of judicial review is whether the agency was engaged in rule making or adjudication. Arguably the courts are more deferential to agency rule making on both questions of law and fact as compared to agency adjudication. "The agency rule making function involves the exercise of discretion and court[s] . . . [should] not substitute its judgment for that of the agency on an issue of discretion, unless the statutes mandate the adoption of the . . . rule." *Bayonet Point Hosp., Inc. v. Department of Health & Rehabilitative Servs.*, 490 So. 2d 1318, 1320 (Fla. 1st Dist. Ct. App. 1986). "[A] court must uphold the validity of a proposed rule, if the rule is reasonably related to the purpose of the enabling legislation, and is not arbitrary and capricious. The burden is on one who attacks a rule to show that the rule exceeds its statutory delegated authority. The person attacking the rule must show also that the rule is arbitrary and capricious by a preponderance of evidence." *Austin v. Department of Health & Rehabilitative Servs.*, 495 So. 2d 777, 779 (Fla. 1st Dist. Ct. App. 1986).

281. *Bayonet Point Regional Medical Center*, 516 So. 2d 995, 999 (Fla. 1st Dist. Ct. App. 1987) (Ervin, J., concurring and dissenting).

282. Judge Ervin, one of the most thoughtful commentators on the standards of judicial review currently sitting on the bench, pointed out that this APA restriction on the power of reviewing courts is consistent with the requirements of separation of powers under the Florida Constitution. FLA. CONST. art. II, § 3. "[T]he judicial branch of government . . . has the duty to maintain and preserve . . . the separation of the three branches of government . . . [by] not substitut[ing] their judgment with reference to matters properly within the domain of the legislative or executive branches of govern-

judgment for that of an agency on questions of law.²⁸³ A reviewing court should overturn an agency's use of its discretion on a question of law only where it was not within the agency's statutory discretion,²⁸⁴ "[i]nconsistent with an agency rule,"²⁸⁵ "[i]nconsistent with an officially stated agency policy or a prior agency practice" and no adequate explanation was offered for the deviation from the policy or practice,²⁸⁶ or violates "a constitutional or statutory provision."²⁸⁷ The APA also precludes a reviewing court from "substitut[ing] its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact."²⁸⁸ A reviewing court should overturn an agency's finding of facts if they were "not supported by competent substantial evidence in the record."²⁸⁹

The problem with the standards of judicial review under the APA is that Florida courts continue to "lack consistency in the application of judicial review standards."²⁹⁰ In order to remedy this inconsistency in

ment." *Bayonet Point Regional Medical Center*, 516 So. 2d at 999 (Ervin, J., concurring and dissenting). Further, he noted that "precluding a reviewing court from substituting its judgment . . . [for] that of the agency on an issue of discretion is simply . . . recognizing that if there are no judicially manageable standards available for judging how an agency should exercise its discretion, it is impossible to evaluate such action for abuse of discretion." *Id.* at 1001 (Ervin, J., concurring and dissenting) (footnotes omitted).

283. FLA. STAT. § 120.68(12)(d) (1987). "But clearly, the courts treat this standard as granting them a substantially greater latitude to disregard an agency's views on the law, as compared to the degree of discretion granted to the courts to disregard an agency's findings on factual issues." Burris, *supra* note 2, at 397.

284. FLA. STAT. § 120.68(12)(a) (1987).

285. *Id.* § 120.68(12)(b).

286. *Id.* § 120.68(12)(c).

287. *Id.* § 120.68(12)(d).

288. *Id.* § 120.68(10).

289. *Id.*

290. *Bayonet Point Regional Medical Center*, 516 So. 2d at 1000 (Ervin, J., concurring and dissenting). Judge Ervin suggests that by looking to federal precedent this confusion in the application of the standards of judicial review may be alleviated. While I agree with Judge Ervin that the Florida courts are anything but consistent in applying the judicial review standards, I disagree with the suggestion that the practice of federal courts in applying the standards for judicial review of federal agency decisions may provide a solution to this problem. The federal courts have their own problems with inconsistent application of the standards of judicial review to agency decisions. See generally Burris, *Administrative Law, 1986 Eleventh Circuit Survey*, 38 MERCER L. REV. 991, 1033-50 (1987); Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); Levin, *Scope-of-Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986).

application of the standards of judicial review and ensure courts do not overstep the scope of their review function, Judge Ervin suggests a four part process oriented approach to the exercise of the judicial review function.²⁹¹ First, "[t]he [reviewing] court should . . . inquire as to whether the agency has ultimate authority over the question of law."²⁹² Second, "the reviewing court should . . . focus on the decision-making process, by determining whether *all* proper and relevant elements have been considered within the process."²⁹³ Third, the reviewing court "must ensure that the administrative decision reflects the appropriate use of such factors."²⁹⁴ Fourth, the reviewing "court should . . . consider if any external pressures may have affected the operation of . . . [the agency's decision] process."²⁹⁵ Having completed these steps in the review process, the court should not review the actual substantive decision reached by the agency. To do so is for the judiciary to usurp "the discretionary function assigned to the agency" by the legislature.²⁹⁶ This is one possible solution to the problem, but it has a substantial cost since the courts will sacrifice part of the role assigned to the courts by the legislature in the APA. A preferable approach would be for the courts to strive, no matter how difficult it may be, to perform the role assigned to them by the legislature under the APA.

A. Preservation of the Right to Review

Of course, in order for the judicial review standards to be applicable the right to judicial review must be properly invoked. An all but too common way in which jurisdiction for judicial review is lost occurs when a party fails to raise an issue before the agency. If a party fails to properly raise the issue before the agency, then the party is "deemed to . . . [have] waived [the issue] and [it] will not be considered on appeal."²⁹⁷ An exception to this general principle of waiver is "where the

291. See Koch, *Judicial Review of Administrative Discretion*, 54 GEO. WASH. L. REV. 469 (1986). Judge Ervin acknowledged that he relied upon this article for many of his comments particularly concerning the impossibility of principled judicial review of an agency's exercise of statutory discretion in reaching a substantive decision.

292. *Bayonet Point Regional Medical Center*, 516 So. 2d at 1005 (Ervin, J., concurring and dissenting).

293. *Id.*

294. *Id.*

295. *Id.* at 1007.

296. *Id.* at 1008.

297. *Rudloe v. Florida Dept. of Env'tl. Regulation*, 517 So. 2d 731, 733 (Fla. 1st

challenge involved essentially a matter of law to be determined by the ordinary rules of statutory construction."²⁹⁸

Even if the issue was properly raised before the court, the burden is still on the petitioner to fully comply with all of the required procedures to properly invoke the power of the courts to exercise their judicial review function. One of these requirements in order for a party to properly invoke its jurisdiction is that the record of the agency proceeding must be transmitted to the district court of appeal. During the past year several courts have confronted the issue of whether there is a statutory right for an indigent to request a free transcript from an agency? In *Unemployment Appeals Commission v. Gretz*,²⁹⁹ the court held that there was no statutory requirement³⁰⁰ that an agency provide an indigent claimant with a free transcript of the proceedings. A transcript is necessary in order to seek judicial review of an administrative order. Without a transcript the court will dismiss the petition for judicial review.³⁰¹ In *Gretz* the court specifically concluded that the Department of Labor rule which provided that everyone must pay \$1.75 per page for a transcript prepared by the Unemployment Appeals Commission was valid.³⁰²

Of course, one must name the appropriate parties in the petition for judicial review. This sometimes includes the agency even though it is often not a real party in interest. This can occasionally lead to unusual results. In *Jack Eckerd Corp. v. Unemployment Appeals Commission*,³⁰³ the court noted that the real parties in interest in judicial review of an Unemployment Appeals Commission's decision are the employer and the former employee and not the Commission even though by statute it is made a party to all proceedings involving judicial review of its decisions.³⁰⁴ The Commission can not be a real party

Dist. Ct. App. 1987).

298. *Id.*

299. 519 So. 2d 1025 (Fla. 1st Dist. Ct. App. 1988).

300. FLA. STAT. § 443.041(2)(a) (1987).

301. *Crothers v. Unemployment Appeals Comm'n*, 524 So. 2d 500 (Fla. 3d Dist. Ct. App. 1988) (per curiam).

302. In this case, the court followed the Third District Court of Appeal. The First District Court of Appeal also followed the Second and Third District Courts of Appeal in certifying the question to the Florida Supreme Court. *Id.* at 1026. See *Martinez v. Unemployment Appeals Comm'n*, 528 So. 2d 373 (Fla. 3d Dist. Ct. App. 1987) (per curiam).

303. 525 So. 2d 468 (Fla. 3d Dist. Ct. App. 1988).

304. *Id.* at 469. See FLA. STAT. § 443.151(4)(c) (1987).

in interest as it has "no cognizable 'interest' . . . [as] with any other decision-making body, [it] does not care who wins the case" in the judicial review process.³⁰⁵ The court went on to hold that even a non-participating employer/appellee may be assessed the cost of the judicial review process because it stood to gain from the affirmance of the Commission's decision.³⁰⁶

B. Need for an Adequate Explanation by the Agency of Its Factual Findings

A fundamental premise of the entire judicial review process is that the agency has provided the court with a reasoned explanation of its interpretation of the applicable legal principles, findings of facts, and the rational linkage between these factual and legal conclusions and its ultimate decision. When an agency has failed to provide an adequate explanation on any of these three matters, the agency has not complied with the APA's requirements and the decision must be reversed and remanded to the agency for a decision which complies with the requirements of the APA. This result is mandated because the failure to provide an adequate explanation makes it impossible for the court to perform the judicial review function assigned to it by the legislature.³⁰⁷

Under the APA it is the duty of the agency to provide an explanation of how the record supports its factual conclusions. It is not the function of a reviewing court "to search the record for any support of order" so the decision may be affirmed.³⁰⁸ In carrying out its duty under the APA to provide an adequate explanation, the agency in reaching its decision must not rely upon evidence which was not admitted as part of the record.³⁰⁹ Nor can the agency supplement the record in the agency

305. *Jack Eckard Corp.*, 525 So. 2d at 469.

306. *Id.*

307. Burris, *supra* note 2, at 387 (footnotes omitted). See FLA. STAT. §§ 120.68(4),(6),(8),(9)-(12) (1987).

308. *Trujillo v. Southern Wine & Spirits*, 525 So. 2d 481, 483 (Fla. 1st Dist. Ct. App. 1988).

309. *Id.* at 483. See FLA. STAT. § 120.68(5) (1987). Generally, if an agency makes reference to matters not in the record, then the reviewing court will reverse the agency's decision as "not supported by competent substantial evidence in the record."

FLA. STAT. § 120.68(10) (1987). While the APA does not explicitly recognize the harmless error doctrine, courts have used the doctrine to justify not reversing agency deci-

appeal process. In *Algor v. Unemployment Appeals Compensation*,³¹⁰ the court noted that where the statutory system envisions that the appeals referee shall be the finder of facts, the Unemployment Appeals Commission in reviewing an appeals referee's decision cannot make factual findings to fill in a gap in the record. The finding of facts is the function of the appeals referee not the Unemployment Appeals Commission. For the Unemployment Appeals Commission to make factual findings is to usurp the function of the appeals referee.³¹¹

C. Scope of Hearing Officer's Authority³¹²

The underlying assumption in the *Algor* case was that factual determinations must be made initially by hearing officers. This raises the issue for a reviewing court of to what extent is an agency free to disregard a hearing officer's findings of fact in its final rule or order. When confronted with this question the courts have held that the agency is performing an appellate function and can generally overturn a hearing officer's findings of fact only when they are not supported by competent substantial evidence.³¹³ "An agency may not reject or modify the find-

sions where the decisions were clearly supported by competent substantial evidence when the material not found in the record was excluded. See *Decola v. Castor*, 519 So. 2d 709, 710-11 (Fla. 2d Dist. Ct. App. 1988). See also *Juste v. Department of Health & Rehabilitative Servs.*, 520 So. 2d 69, 73 (Fla. 1st Dist. Ct. App. 1988) (The court rejected the application of the harmless error doctrine.).

310. 516 So. 2d 1113 (Fla. 2d Dist Ct. App. 1987).

311. *Id.* at 1114.

312. See *Burris*, *supra* note 2, at 388-95; Comment, *Judicial Review of Substituted Agency Fact-Finding: Florida Courts' Innovative Solution to the Competent Substantial Evidence "Conundrum"*, 35 U. FLA. L. REV. 151 (1983).

313. See *Burris*, *supra* note 2, at 389-94.

First, if the factual finding concerns 'weight or credibility of testimony by witnesses, or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight,' then the court must give greater weight to hearing officer's factual findings. Second, if the factual finding concerns matters which were 'infused by policy considerations for which the agency has special responsibility,' then the court must give greater weight to the agency's decision. In cases involving the first type of factual issues, an agency, just as a court, must leave the finding of facts of the hearing officer undisturbed, unless it can be demonstrated that the findings are not supported by competent substantial evidence. In cases involving the second type of factual issues, the agency, unlike the court, is generally free to substitute its judgment on these factual issues for those of the hearing

ings of fact of the hearing officer unless the agency first determines from a review of the complete record that the findings of fact were not based upon competent, substantial evidence."³¹⁴ In cases where the agency rejects the factual findings of the hearing officer, it has the burden of demonstrating that its decision was justified based upon the record.³¹⁵ An exception to this rule is when the factual findings are inextricably linked to policy considerations, then the agency has greater freedom to reject the hearing officer's factual findings because the agency is charged by the legislature with the primary responsibility for making such judgments.³¹⁶

In *Bayonet Point Regional Medical Center v. Department of Health & Rehabilitative Services*,³¹⁷ the HRS had denied Bayonet Point Regional Medical Center's application for a certificate of need for a cardiac catheterization laboratory and an open heart surgery service. Bayonet Point Regional Medical Center appealed claiming that the HRS erred in rejecting the hearing officer's finding that there was a need for the proposed facilities.³¹⁸ The HRS did not contest the hearing officer's findings of fact and adopted them in its order. Given the admitted correctness of the hearing officer's findings of fact, there was no basis for the HRS's contrary decision. In light of the findings of fact, the hearing officer correctly applied the statutory³¹⁹ and HRS rule cri-

officer.

Id. at 389 (footnotes omitted).

314. *National Indus. Inc. v. Commission on Human Relations*, 527 So. 2d 894, 897 (Fla. 5th Dist. Ct. App. 1988). *See also* *Berry v. Department of Env'tl. Regulation*, 530 So. 2d 1019, 1022 (Fla. 4th Dist. Ct. App. 1988); *Henderson Signs v. Department of Transp.*, 397 So. 2d 769, 772-73 (Fla. 1st Dist. Ct. App. 1981) (per curiam) (An agency cannot add essential facts missing from the hearing officer's decision.). *Cf. Lujan v. Department of Professional Regulation*, 528 So. 2d 27, 28 (Fla. 3d Dist. Ct. App. 1988) (per curiam) (by implication).

315. *See, e.g., Wash & Dry Vending Co. v. Department of Business Regulation*, 429 So. 2d 790, 792 (Fla. 3d Dist. Ct. App. 1983); *Woodward v. Department of Professional Regulation*, 432 So. 2d 146, 147 (Fla. 1st Dist. Ct. App. 1983).

316. *Berry*, 530 So. 2d at 1022. *But see* *Salz v. Department of Administration*, 432 So. 2d 1376, 1377-78 (Fla. 3d Dist. Ct. App. 1983) (appears to endorse deference to hearing officer's decision on policy matters also).

317. 516 So. 2d 995 (Fla. 1st Dist. Ct. App. 1987).

318. *Id.* at 996.

319. *But see id.* at 1006-07. (Ervin, J., concurring and dissenting) (Judge Ervin argued the court should have deferred to HRS's interpretation of its own rules which required a rejection of the hearing officer's evidence because it was based upon a misapplication of the not-normal circumstance exception to the regular method of determining whether a certificate of need application should be granted.).

teria in reaching his decision; HRS erred in reversing the hearing officer's decision.³²⁰ In *Signal Applied Technologies, Inc. v. Finley*,³²¹ the court reaffirmed the rule that it is inappropriate for the Unemployment Appeals Commission to reverse the appeals referee's factual findings when the referee's factual findings were supported by competent, substantial evidence.³²² The Commission is not permitted to reverse the decision of the appeals referee on a factual matter only because it disagreed with the appeals referee about the weight and meaning of the testimony.³²³

Reviewing courts are reluctant to allow agencies to escape the application of the competent, substantial evidence test by characterizing the factual matters as involving policy questions over which the agency has substantial greater control. In *Bernal v. Department of Professional Regulation*,³²⁴ the court noted that the APA also gives the hearing officer's recommendation of the penalty to be imposed as a result of an administrative hearing a presumption of correctness. An agency may disregard the hearing officer's recommended penalty only where it has reviewed the complete record and stated with particularity its reasons for deviating from the hearing officer's recommended penalty.³²⁵ The court noted, in overturning the Board of Medicine's rejection of the hearing officer's recommended penalty as too lenient, that the conduct of the person defending himself in an administrative action is not

320. *Id.* at 997. In a somewhat unusual action the court ordered HRS to grant the certificate of need, rather than remand the case to HRS for further proceedings consistent with the court's opinion. *Id.* at 997-98; *Id.* at 1007 (Ervin, J., concurring and dissenting). Compare FLA. STAT. §§ 120.68(8), (9)(b), and (10)-(13) (1987) (directing remand be used as the preferred remedy) with FLA. STAT. § 120.68(11) (1987) ("or order agency action if the facts compel a particular action as a matter of law").

321. 519 So. 2d 64 (Fla. 5th Dist. Ct. App. 1988).

322. "The Commission can only reverse the findings and conclusions of the referee when there is no competent, substantial evidence to support the referee's finding." *Id.* at 65.

323. *Id.* (by implication). But see *id.* at 66 (Upchurch, J., dissenting) (Judge Upchurch argued that the reversal of the appeals referee by the Commission was justified because the factual findings, even if true, were not sufficient to constitute misconduct under the unemployment benefits statute. This is a question of law which is within the decision discretion of the Commission, not the appeals referee.).

324. 517 So. 2d 113 (Fla. 3d Dist. Ct. App. 1987) *aff'd*, 531 So. 2d 967 (Fla. 1988) (The court explicitly disapproved of the decision in *Britt v. Department of Professional Regulation*, 492 So. 2d 697 (Fla. 1st Dist. Ct. App. 1986).).

325. FLA. STAT. § 120.57(1)(b)(10) (1987).

1989]

a valid reason for increasing the penalty.³²⁶ Nor is a mere "disagreement with the assessment of the seriousness of the offense by the hearing officer, made not as a general position, but as tailored to the situation of" this particular case, an adequate justification for rejecting the hearing officer's recommended penalties.³²⁷ The court went on to note that such a disagreement, if it was on a generalized policy level, would justify rejecting the hearing officer's recommended penalty, but where the disagreement is not a reflection of a policy decision, then it is a mere attempt by the Board of Medicine to substitute its judgment for that of the hearing officer, something section 120.57(1)(b)(10) of the APA prohibits.³²⁸

The agency also cannot escape the application of this approach to its disagreement with a hearing officer over factual findings by labeling the matter as a question of law, where an agency has substantially greater discretion to reject the hearing officer's conclusion,³²⁹ instead of fact. In *Health Care & Retirement Corp. v. Department of Health &*

326. *Bernal*, 517 So. 2d at 115.

327. *Id.* at 115-16.

328. The court certified this issue to the Florida Supreme Court because its decision conflicted with that reached by the First District Court of Appeal in *Britt v. Department of Professional Regulation*, 492 So. 2d 697 (Fla. 1st Dist. Ct. App. 1986).

329.

In cases where the agency and hearing officer disagree on the resolution of questions of law, the courts again are faced with a demand for dual deference. However, in these cases the agency clearly wins out over the hearing officer. Agencies have substantially greater discretion to reject the hearing officer's decision in the area of questions of law. Given this greater degree of discretion, the courts, in almost all cases, defer to the agency's interpretation on questions of law rather than the hearing officer's. But the courts have carefully restricted the scope of agency discretion on questions of law to insure that it does not become a device for agencies to engage in an independent reassessment of the hearing officer's findings of fact. An agency's role, when the hearing officer failed to correctly interpret the law in reaching his decision, is to independently apply the correct legal principles to the facts found by the hearing officer.

Burris, *supra* note 2, at 394 (footnote omitted). *Spurlin v. School Bd.*, 520 So. 2d 294 (Fla. 2d Dist. Ct. App. 1988), is an example of the discretion an agency has in matters concerning a question of law. In *Spurlin*, the court held that under the statutory scheme restricting the discretion of a school board in personnel decisions, the Board can reject the personnel recommendations of the superintendent not only for those matters which would justify dismissal or suspension of an employee, but also for good cause which may be matters bearing on the moral and professional qualifications such as those found in the Department of Education's administrative rules. *Id.* at 296-97. See FLA. STAT. § 231.36(4)(c) (1987).

Rehabilitative Services,³³⁰ HRS denied Health Care and Retirement Corporation of America (HCRCA) a certificate of need for the construction of a nursing home in Palm Beach County. In doing so, HRS rejected the hearing officer's recommended order that the certificate of need application be granted, because even though under the HRS formula there was no need for the facility under the regular need formula,³³¹ the circumstances justified granting a special exception for the construction of this nursing home.³³² The hearing officer found that HCRCA had proven that there was a need for a facility designed to care for people with Alzheimer's disease and in need of subacute care, and this was a circumstance justifying granting a special exception.³³³ HRS accepted all of the hearing officer's findings of fact, but rejected the hearing officer's recommendation as to the granting of special exception, because this was a conclusion of law on which the hearing officer had erred.³³⁴

The court held that HRS was correct, in part, in concluding that the issue of whether a special exception exists was a question of law. The ultimate decision of whether the facts found by the hearing officer supported a finding of a special circumstance is a question of law. But in deciding this ultimate issue the HRS is not free to ignore the factual findings of the hearing officer. The HRS may not freely substitute its judgment for that of the hearing officer on factual issues. The HRS, just like the courts, can reject the hearing officer's factual findings only if they were not supported by competent, substantial evidence.³³⁵ In this case, the HRS had attempted to circumvent this requirement by considering its factual disagreement with the hearing officer as a legal question.³³⁶ The HRS wanted the court to consider this a purely legal

330. 516 So. 2d 292 (Fla. 1st Dist. Ct. App. 1987) (per curiam).

331. FLA. ADMIN. CODE ANN. r. 10-5.11(21)(b) (1987).

332. *Health Care & Retirement Corp.*, 516 So. 2d at 293. HRS rules provided for the granting of a certificate of need if a special exception exists even though there was no need under the regular need formula. Fla. Admin. Code Ann. r. 10-5.11(21)(b)(10) (1987).

333. *Health Care & Retirement Corp.*, 516 So. 2d at 294-95.

334. *Id.* at 295.

335. Compare FLA. STAT. § 120.68(10) (1987) with FLA. STAT. § 381.494(8)(E) (1986) (CURRENTLY CODIFIED AT FLA. STAT. § 381.709(6)(b) (1987)). See *Wash & Dry Vending Co. v. Department of Business Regulation*, 429 So. 2d 790, 792 (Fla. 3d Dist. Ct. App. 1983).

336. Courts are also occasionally guilty of confusing the dichotomy between factual and legal issues. See *Buckeye Cellulose Corp. v. Williams*, 522 So. 2d 39, 40-41 (Fla. 1st Dist. Ct. App. 1988) (modified on denial of reh'g) (Thompson, J., dissenting).

question because there was no evidence in the record to support the HRS's contrary factual conclusions.³³⁷ The court concluded that HRS's decision must be reversed because its contrary conclusions on these factual matters are "inconsistent with the findings of fact in the recommended order."³³⁸

D. Deferential Judicial Review of Factual Issues³³⁹

As noted earlier, a court cannot "substitute . . . [its] judgment as to the weight of the evidence on any disputed fact even though . . . [it] might have reached a different conclusion on the same evidence. The weight of the evidence is for the administrative agencies, not the courts."³⁴⁰ Consequently the development of the record is critical to the success of any judicial review of an agency's finding of facts.³⁴¹

The competent, substantial evidence standard of judicial review is deferential in nature. The result is that in most cases the agency's factual conclusions will be affirmed after a brief discussion of the relevant points in the record to demonstrating the sufficiency of the evidence.³⁴² A "court may not substitute its judgment for that of the agency as to disputed findings of fact or the weight of the evidence, an agency deter-

(Where the agency has misinterpreted the law and this caused the agency to erroneously conclude the record satisfied the requirements of the statutory system, then courts may reject the factual determinations made by the agency as not supported by competent substantial evidence.)

337. Judge Ervin in a thoughtful concurring and dissenting opinion argued that the HRS could reasonably have concluded that the evidence in the record did not constitute competent substantial evidence. *Health Care & Retirement Corp.*, 516 So. 2d at 297-98. (Ervin, J., concurring and dissenting).

338. *Id.* at 296. Such an error constitutes a decision which is arbitrary, capricious, or not in compliance with controlling statutes and requires the reviewing court to reverse the agency's decision. See FLA. STAT. § 381.709(6)(b) (1987).

339. See Burris, *supra* note 2, at 399-403.

340. *Buckeye Cellulose Corp. v. Williams*, 522 So. 2d 39, 40 (Fla. 1st Dist. Ct. App. 1988) (*modified on denial of reh'g*). When an agency failed to make any fact findings to support its exercise of discretion, then courts will hold the agency abused its discretion and exceeded its authority. See, e.g., *Lopez-Torres v. Department of Transp.*, 488 So. 2d 848, 850 (Fla. 4th Dist. Ct. App. 1986).

341. This is also true of intra-agency review of the factual findings. *Rock, Standards for Administrative Review - Two Bites at the Apple*, 60 FLA. B.J. 43 (November 1986).

342. See, e.g., *Jordan v. Department of Professional Regulation*, 522 So. 2d 450, 452 (Fla. 1st Dist. Ct. App. 1988); *Major v. Department of Professional Regulation*, 531 So. 2d 411 (Fla. 3d Dist. Ct. App. 1988).

mination will be set aside if it depends on a fact not supported by competent substantial evidence in the record."³⁴³ This deference to the agency is a reflection of two policy considerations. First, the legislature's determination that the agency should make these initial determinations because it is in the best position to do so as the governmental body charged with exercising its expertise in the area.³⁴⁴ Second, the agency is the body which heard the testimony and is in the best position to evaluate it especially on the issue of witness credibility.³⁴⁵

E. Substitution of Judgment by Reviewing Courts on Factual Issues³⁴⁶

While deference to an agency's factual findings is the norm, there are circumstances where the courts can quite appropriately reject an agency's factual findings. During the past year, several cases provided these examples of when this may be appropriately done by a reviewing court. First, when it is clear that the agency has misread the factual record and reached factual conclusions which have no basis in the record, the reviewing court should reverse because there is no competent, substantial evidence supporting the agency's factual findings.³⁴⁷ Sec-

343. *Williams v. Department of Health & Rehabilitative Servs.*, 522 So. 2d 951, 955 (Fla. 1st Dist. Ct. App. 1988). See also *Department of Professional Regulation v. Bernal*, 531 So. 2d 967, 968 (Fla. 1988); *Martin Luther King Economic Dev. Corp. v. Department of Community Affairs*, 528 So. 2d 385 (Fla. 3d Dist. Ct. App. 1988); *South Fla. Water Management Dist. v. Caluwe*, 459 So. 2d 390, 395 (Fla. 4th Dist. Ct. App. 1984).

344. See *Department of Professional Regulation v. Bernal*, 531 So. 2d 967, 968 (Fla. 1988); *Global Water Conditioning v. Department of Agriculture & Consumer Servs.*, 521 So. 2d 126, 129-30 (Fla. 1st Dist. Ct. App. 1988) (clarified).

345. *Buckeye Cellulose Corp. v. Williams*, 522 So. 2d 39 (Fla. 1st Dist. Ct. App. 1988) (modified on denial of reh'g). See *Sturaitis v. Montanari Clinical School, Inc.*, 522 So. 2d 429, 430 (Fla. 4th Dist. Ct. App. 1988).

346. See *Burris*, *supra* note 2, at 403-06.

347. E.g., *Daniels v. Unemployment Appeals Comm'n*, 531 So. 2d 1047 (Fla. 2d Dist. Ct. App. 1988) (An example of a well reasoned explanation of why the record was deficient under the competent substantial evidence standard of judicial review); *Martin Luther King Economic Dev. Corp. v. Department of Community Affairs*, 528 So. 2d 385, 388 (Fla. 3d Dist. Ct. App. 1988) (Ferguson, J., dissenting); *Walker v. Turlington*, 516 So. 2d 1123 (Fla. 3d Dist. Ct. App. 1987) (per curiam) (The Education Practice Commission's decision to revoke Walker's teaching certificate for three years was reversed because it was based upon the Commission's factual finding that Walker had received ten years of unsatisfactory teaching reviews, when the record disclosed only one year where she received an unsatisfactory teaching review.).

1989]

ond, when the reviewing court can determine that the agency failed to follow the requirements of its rules or statutes for proving a factual matter,³⁴⁸ the court may reject the agency's factual determination on that matter³⁴⁹ and reverse and remand the case to the agency for a hearing conducted using the correct method for proof of the factual matter.³⁵⁰ Third, when the agency's individual factual determinations are supported by competent, substantial evidence, but the ultimate factual conclusions of the agency are contrary to these findings, then the reviewing court may reverse the agency's ultimate factual conclusion.³⁵¹

The appropriateness of a reviewing court rejecting an agency's factual findings is less clear in cases like *Ferris v. Turlington*.³⁵² In *Ferris*, the court held that because "the proceedings implicate the loss of livelihood" the due process clause required that revocation of a professional license must be supported by clear and convincing evidence.³⁵³ This heightened burden of persuasion requires a more vigorous application of the competent, substantial evidence standard found in the APA.³⁵⁴ Similarly, in *Smith v. Department of Health & Rehabilitative Services*,³⁵⁵ the court clearly viewed the burden of persuasion as a critical element in shaping what it may consider as satisfying the competent, substantial evidence requirement. The court in *Smith* noted that the burden of persuasion on HRS was the "[c]lear and convincing evidence" [standard which] is an intermediate standard of proof, [requiring] more than the 'preponderance of the evidence' standard used in

348. *Atlantic Outdoor Advertising v. Department of Transp.*, 518 So. 2d 384, 386 (Fla. 1st Dist. Ct. App. 1987); *American Ins. Ass'n. v. Department of Ins.*, 518 So. 2d 1342, 1346 (Fla. 1st Dist. Ct. App. 1988) (The court reversed the order of the Department of Insurance establishing a joint underwriting association of property and casualty insurers due to a temporary unavailability of property and casualty insurance because the Department of Insurance did not apply the preponderance of the evidence test in establishing the need for the underwriting association in its order. The court also reversed the Department of Insurance order because it did not address during the hearing several elements it was required to establish before issuing such an order.).

349. *Atlantic Outdoor Advertising*, 518 So. 2d at 386.

350. *See id.*; *Department of Transp. v. Lopez-Torres*, 526 So. 2d 674, 676-77 (Fla. 1988).

351. *Williams v. Department of Health & Rehabilitative Servs.*, 522 So. 2d 951, 955-56 (Fla. 1st Dist. Ct. App. 1988). *See also* FLA. STAT. § 120.68(10) (1987).

352. 510 So. 2d 292 (Fla. 1987).

353. *Id.* at 294-5.

354. *Id.*

355. 522 So. 2d 956 (Fla. 1st Dist. Ct. App. 1988).

most civil cases, and less than the 'beyond reasonable doubt' standard used in criminal cases."³⁵⁶ In such cases the court stated that to satisfy a reviewing court that HRS had met its burden "[t]he evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established."³⁵⁷ This meant that the burden of evidence necessary to satisfy the competent, substantial evidence standard in judicial review was substantially heightened, and the court may correspondingly have greater discretion to reject the agency's factual determinations.

In the past the courts have held that it was

appropriate for a court to substitute its judgment on factual issues in resolving a constitutional issue or when the court confronts factual issues in the context of determining whether the agency had jurisdiction to act. In such circumstances, the reason for deference is diminished by the need for the courts to insure agencies act consistent with the constitution and to insure that agencies do not expand their jurisdiction beyond that delegated to them by the legislature.³⁵⁸

The *Ferris* and *Smith* cases are troubling because they link the less deferential form of judicial review under the competent, substantial evidence test not solely to the presence of potential constitutional issue, but to when an agency has a heightened burden of persuasion in the hearing process. This suggests courts can invoke the much less deferential version of the competent, substantial evidence standard of judicial review in cases in which there is no arguable constitutional issue, but only the heightened burden of persuasion. To do so runs counter to the APA paradigm for judicial review of factual issues without the necessary justification founded upon constitutional concerns.³⁵⁹

356. *Id.* at 958.

357. *Slomowitz v. Walker*, 429 So. 2d 797, 799 (Fla. 4th Dist. Ct. App. 1983).

358. *Burris*, *supra* note 2, at 404-05.

359. See FLA. STAT. § 120.68(10) (1987). *Cf.* *American Ins. Ass'n v. Department of Ins.*, 518 So. 2d 1342, 1346 (Fla. 1st Dist. Ct. App. 1988) ("It is not the burden of proof required of an agency in administrative proceedings. An agency in an administrative proceeding is required to prove its case by a preponderance of the evidence. The competent substantial evidence test may be met and that evidence still may wholly fail to constitute a preponderance of the evidence.").

F. Unenlightening Judicial Review of Factual Findings³⁶⁰

During the past year, the courts have continued to engage in two types of unenlightening conclusory judicial review of factual issues.

First, there are a group of cases where the courts summarily affirm the agency's factual findings by quoting extensively from the agency decision. [Second there are those] cases [in] which [the courts] summarily resolved claims that the agency's factual determinations did not comply with the competent substantial evidence standard.³⁶¹

An example of the first type is *Glenn v. Unemployment Appeals Commission*.³⁶² In *Glenn*, the court's opinion consists mainly of a lengthy quote from the Unemployment Appeals Commission decision with the following conclusion:

We have considered the findings of fact and decisions of the appeals referee and the appeals commission in the light of the record and the controlling decisions of the courts of Florida and have concluded that the order of the appeals commission is correct and should be affirmed.³⁶³

Such a decision is totally devoid of any explanation of why the court chose to affirm the Appeals Commission instead of the appeals referee. The only thing that is clear is that the court agreed with the decision of Appeals Commission.³⁶⁴ The good news is while the courts have continued to render this type of opinion, they did it less often in the past year than before.³⁶⁵ A variation on this type of opinion, but less troublesome, is *Jacob v. School Board*.³⁶⁶ In *Jacob*, the court offered a brief explanation of why it affirmed³⁶⁷ and then quoted extensively from the

360. Burris, *supra* note 2, at 407-10.

361. *Id.* at 407.

362. 516 So. 2d 88 (Fla. 3d Dist. Ct. App. 1987) (per curiam).

363. *Id.* at 90.

364. This type of decision is also occasionally used in affirming an agency's interpretation of a statute. *E.g.*, *Hamptons Dev. Corp. v. Department of Business Regulation*, 519 So. 2d 661 (Fla. 3d Dist. Ct. App. 1988) (per curiam).

365. *See* Burris, *supra* note 2, at 407.

366. 519 So. 2d 1002 (Fla. 2d Dist. Ct. App. 1988) (per curiam).

367. "We conclude that the appellee did not reject the actual findings of the hearing officer, but only rejected the conclusions of the hearing officer and his interpretation of the rules applicable to the case." *Id.* at 1003.

record as an explanation.³⁶⁸

Bernal v. Department of Professional Regulation,³⁶⁹ is an example of the second type of unenlightening judicial review of agency's factual findings.³⁷⁰ Without discussing any of the evidence in the record, the court summarily affirmed the agency's factual findings as sufficiently supported by the record. "Since the findings of Dr. Bernal's violations are amply supported by the testimony, we reject the appellant's con-

368. *Id.* at 1003-05.

369. 517 So. 2d 113 (Fla. 3d Dist. Ct. App. 1987).

370. Of similar concern is the continued use by the courts of the generally unenlightening per curiam affirmed opinions to decide many administrative law cases. *See, e.g., Gulf Coast Home Health Servs. v. Department of Health & Rehabilitative Servs.*, 519 So. 2d 676 (Fla. 1st Dist. Ct. App. 1988) (per curiam) (citing one case in support of the one word opinion - "AFFIRMED."); *Rizzo v. Department of Professional Regulation*, 519 So. 2d 1019 (Fla. 4th Dist. Ct. App. 1988) (per curiam) (The majority opinion is one word - "AFFIRMED" - with no citation). *See also Alvarez v. Unemployment Appeals Comm'n.*, 530 So. 2d 1108 (Fla. 3d Dist. Ct. App. 1988) (per curiam); *Etue v. Department of Professional Regulation*, 524 So. 2d 1175 (Fla. 4th Dist. Ct. App. 1988) (per curiam); *Florida Windstorm Underwriting Ass'n*, 525 So. 2d 975 (Fla. 1st Dist. Ct. App. 1988) (per curiam); *Gray v. Department of State*, 524 So. 2d 503 (Fla. 3d Dist. Ct. App. 1988) (per curiam); *Gulf Coast Home Health Servs. v. Department of Health & Rehabilitative Servs.*, 519 So. 2d 1053 (Fla. 1st Dist. Ct. App. 1988) (per curiam); *Health Care & Retirement Corp. v. Department of Health & Rehabilitative Servs.*, 526 So. 2d 743 (Fla. 1st Dist. Ct. App. 1988) (per curiam); *HRS District XI v. Searcy*, 523 So. 2d 797 (Fla. 1st Dist. Ct. App. 1988) (per curiam); *Interstate Underwriting Agencies, Inc. v. Department of Ins.*, 528 So. 2d 549 (Fla. 3d Dist. Ct. App. 1988) (per curiam); *Jones v. Department of Professional Regulation*, 524 So. 2d 700 (Fla. 1st Dist. Ct. App. 1988) (per curiam); *Leonard v. Unemployment Appeals Comm'n.*, 528 So. 2d 395 (Fla. 3d Dist. Ct. App. 1988) (per curiam); *Ramirez v. Department of Transp.*, 519 So. 2d 745 (Fla. 3d Dist. Ct. App. 1988) (per curiam); *Royal Caribbean Cruise Line, Inc. v. Unemployment Appeals Comm'n.*, 525 So. 2d 1036 (Fla. 1st Dist. Ct. App. 1988) (per curiam); *Smith v. Unemployment Appeals Comm'n.*, 520 So. 2d 309 (Fla. 3d Dist. Ct. App. 1988) (per curiam); *Young v. Department of Banking & Fin.*, 528 So. 2d 502 (Fla. 2d Dist. Ct. App. 1988) (per curiam); *Betancourt v. Department of Health & Rehabilitative Servs.*, 517 So. 2d 75 (Fla. 3d Dist. Ct. App. 1987) (per curiam). Of course the real impact of these cases as far as the parties are concerned besides the conclusion reached by the reviewing court is that review by the Florida Supreme Court is precluded. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

Even less enlightening are the decisions reported without a published opinion. *See, e.g., Coleman v. Walt Disney World Co.*, 519 So. 2d 998 (Fla. 4th Dist. Ct. App. 1988); *Kleinschmidt v. Comm'n. on Human Relations*, 519 So. 2d 996 (Fla. 3d Dist. Ct. App. 1988); *White v. Unemployment Appeals Comm'n.*, 519 So. 2d 994 (Fla. 2d Dist. Ct. App. 1988).

trary contention on the issue.”³⁷¹ Cases such as this are not necessarily wrongly decided, but it is anyone’s guess as to why the court reached the conclusion it did on the issue of whether there was competent, substantial evidence in the record to support the agency’s factual conclusions.³⁷² “The shortcoming of such opinions is again that the courts have not engaged in any articulation of the reasons why these records are sufficient or insufficient to support an agency’s factual findings.”³⁷³

G. Deferential Judicial Review of Questions of Law³⁷⁴

While normally questions of law are matters for the judiciary to independently determine,³⁷⁵ this is not true in the administrative pro-

371. *Bernal*, 517 So. 2d at 115. The court cited three cases in support of this conclusion.

372. There are unfortunately many cases decided in this manner. *E.g.*, *Alterman Transp. Lines, Inc. v. Department of Transp.*, 519 So. 2d 1005, 1006 n.1 (Fla. 1st Dist. Ct. App. 1988) (“Because we find competent, substantial evidence to support the remaining three issues on appeal, we do not find it necessary to discuss those issues.” This was perhaps the worst of these cases as the DOT reversed several of the hearing officer’s findings of fact. A circumstance that usually requires the court to reverse the agency.); *Florida Windstorm Underwriting Assoc. v. Boca Grande Club, Inc.*, 518 So. 2d 443, 444 (Fla. 1st Dist. Ct. App. 1988) (“We have examined the record in the instant case and conclude there is competent, substantial evidence supporting those findings” made by the Department of Insurance.); *Lavery v. Department of Highway Safety & Motor Vehicles*, 523 So. 2d 696, 697 (Fla. 3d Dist. Ct. App. 1988) (*per curiam*) (“[T]here was substantial competent evidence adduced below to support the finding that Lavery had violated the Florida criminal drug abuse statutes by using cocaine over a sustained period of time, which illegal use resulted in poor work performance.”); *Lewis v. Department of Professional Regulation*, 529 So. 2d 751 (Fla. 3d Dist. Ct. App. 1988) (applying clear and convincing evidence test); *Manasota Osteopathic General Hosp., Inc. v. Department of Health & Rehabilitative Servs.*, 523 So. 2d 710, 711 (Fla. 1st Dist. Ct. App. 1988) (“After careful review of the record, we are convinced that ample competent, substantial evidence supported the ruling of the Department[s]” factual determinations.); *Meadowbrook Utility Systems, Inc. v. Public Serv. Comm’n*, 518 So. 2d 326, 327 (Fla. 1st Dist. Ct. App. 1988) (*per curiam*); *Walter v. School Bd.*, 518 So. 2d 1331, 1335 (Fla. 1st Dist. Ct. App. 1988) (“As to appellant’s contention that there was a lack of competent, substantial evidence at the March 26, 1987, evidentiary hearing to substantiate the School Board’s finding that appellant was in possession of marijuana, we must disagree.”). *See also Seagrave House, Inc. v. Unemployment Appeals Comm’n*, 522 So. 2d 476, 477 (Fla. 5th Dist. Ct. App. 1988) (The court briefly mentioned the factual findings made by the appeals referee, but no discussion of why the record supported those findings.).

373. Burris, *supra* note 2, at 409.

374. *See id.* at 410-14.

375. “It is emphatically the province and duty of the judicial department to say

cess.³⁷⁶ Under the APA "deference usually will be accorded an administrative agency's interpretation of matters entrusted by statute to its discretion or expertise" by reviewing courts.³⁷⁷ "This approach to judicial review [is designed to] properly preserve[] the balance of responsibilities established by the legislature [between the courts and agencies] and safeguard[] against an agency acting outside the scope of its delegated authority."³⁷⁸

This deference to agency resolution of legal questions was expressed in many ways by the courts during the past year. Some courts focused on whether the agency resolution of the legal issue was erroneous. "The agency's interpretation of its own rule is entitled to great weight and persuasive force."³⁷⁹ "[I]n reviewing administrative interpretations of regulatory statutes or rules . . . [agency] interpretations are entitled to great weight, and will not be overturned . . . unless they are clearly erroneous."³⁸⁰ "The burden is upon . . . [the party challenging an agency's interpretation] to show that the . . . [agency's] inter-

what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Generally, this is based upon the principle of separation of powers. See FLA. CONST. art. II, § 3.

376. *But see* *Laborers' Int'l Union v. Burroughs*, 522 So. 2d 852, 854 (Fla. 3d Dist. Ct. App. 1988) (An agency cannot interpret the law as that is the function of the courts.).

377. *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 250 (Fla. 1987). *See also* *Bishop Assocs. Ltd. Partnership v. Belkin*, 521 So. 2d 158, 160-3 (Fla. 1st Dist. Ct. App. 1988); *Hamptons Dev. Corp. v. Department of Business Regulation*, 519 So. 2d 661 (Fla. 3d Dist. Ct. App. 1988) (per curiam); *James B. Bean Distilling Co. v. Department of Business Regulation*, 530 So. 2d 450, 452 (Fla. 1st Dist. Ct. App. 1988); *Paisley v. Department of Ins.*, 526 So. 2d 167, 169 (Fla. 1st Dist. Ct. App. 1988).

378. *Burris*, *supra* note 2, at 412.

379. *Bayonet Point Regional Medical Center v. Department of Health & Rehabilitative Servs.*, 516 So. 2d 995, 996-97 (Fla. 1st Dist. Ct. App. 1987). *See also* *Satellite Television Eng'g, Inc. v. Department of Gen. Servs.*, 522 So. 2d 440, 442 (Fla. 1st Dist. Ct. App. 1988).

380. *Bayonet Point Regional Medical Center*, 516 So. 2d at 999 (Ervin, J., concurring and dissenting). *See also* *Atlantic Outdoor Advertising v. Department of Transp.*, 518 So. 2d 384, 386 (Fla. 1st Dist. Ct. App. 1987); *Department of Admin. v. Moore*, 524 So. 2d 704, 707 (Fla. 1st Dist. Ct. App. 1988); *McNair v. Criminal Justice Standards & Training Comm'n*, 518 So. 2d 390, 391 (Fla. 1st Dist. Ct. App. 1987); *Department of Transp. v. Florida Coalition of Rail Passengers, Inc.*, 466 So. 2d 403, 406 (Fla. 1st Dist. Ct. App. 1985); *All Seasons Resorts, Inc. v. Department of Business Regulation*, 455 So. 2d 544, 547 (Fla. 1st Dist. Ct. App. 1984); *Southeastern Volusia Hosp. Dist. v. National Union of Hosp. & Health Care Employees*, 429 So. 2d 1232, 1234 (Fla. 5th Dist. Ct. App. 1983) (emphasizing long standing aspect of the agency's interpretation).

pretation . . . is clearly erroneous, not merely that another interpretation would lead to a more just result.”³⁸¹ Other courts focused on whether the agency resolution of the legal issue was within the realm of possible interpretations. “[T]he reviewing court should defer to *any* [agency] interpretation [of a statute or rule] that is within the range of possible interpretations.”³⁸² “An agency’s construction of a statute will be accorded great deference, except when there is clear error or conflict with the intent of the statute.”³⁸³ Other courts focused on whether the agency resolution of the legal issue was within the realm of reasonable interpretations. An agency’s interpretation of a statute should be upheld by a reviewing court as long as it is “reasonable . . . [and] the plain language of the statute does not” refute the interpretation offered.³⁸⁴ And some courts apparently combine the various formulations:

Where . . . the agency’s interpretation of a statute has been promulgated in rulemaking proceedings, the validity of such rule must be upheld if it is reasonably related to the purposes of the legislation interpreted and it is not arbitrary and capricious. The burden is upon petitioner in a rule challenge to show by a preponderance of the evidence that the rule or its requirements are arbi-

381. *Eddy Corp. v. Department of Transp.*, 522 So. 2d 421, 422 (Fla. 5th Dist. Ct. App. 1988) (reversing interpretation of statute which was clearly erroneous); *Sandlin v. Criminal Justice Standards & Training Comm’n*, 518 So. 2d 1292, 1295 (Fla. 1st Dist. Ct. App. 1987). *See also* *Adain v. Unemployment Appeals Comm’n*, 523 So. 2d 175, 177 (Fla. 3d Dist. Ct. App. 1988) (by implication); *Antel v. Department of Professional Regulation*, 522 So. 2d 1056 (Fla. 5th Dist. Ct. App. 1988) (by implication). *But see* *Sanitation Employees Ass’n, Inc. v. Metropolitan Dade County*, 526 So. 2d 128 (Fla. 3d Dist. Ct. App. 1988) (The court adopted what it saw as the wiser policy rather than follow the agency interpretation.).

382. *Bayonet Point Regional Medical Center*, 516 So. 2d at 1000 (Ervin, J., concurring and dissenting). *See also* *45th St. Mental Health Center, Inc. v. Department of Health & Rehabilitative Servs.*, 526 So. 2d 716, 719 (Fla. 1st Dist. Ct. App. 1988) (The agency interpretation of the statute was reasonable and must be affirmed by the reviewing court.). *Cf.* *Vaughan v. Shop & Go, Inc.*, 526 So. 2d 91 (Fla. 4th Dist. Ct. App. 1987) (by implication).

383. *Gulf Coast Home Health Servs. of Fla., Inc. v. Department of Health & Rehabilitative Servs.*, 527 So. 2d 262, 264 (Fla. 1st Dist. Ct. App. 1988); *Martin Luther King Economic Dev. Corp. v. Department of Community Affairs*, 528 So. 2d 385 (Fla. 3d Dist. Ct. App. 1988) (affirming the agency’s view of what the statute required). *But see id.* at 264-66 (Booth, J., dissenting) (Judge Booth argued that HRS’s approach to these applications was inconsistent with the statute governing licensing and the APA. Certificate of need analysis is not appropriate in this case.).

384. *James B. Bean Distilling Co. v. Department of Business Regulation*, 530 So. 2d 450, 452 (Fla. 1st Dist. Ct. App. 1988).

trary and capricious. Moreover, the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations.³⁸⁵

In *Health Care & Retirement Corp. v. Department of Health & Rehabilitative Services*,³⁸⁶ the court noted that where the standard of judicial review "is arbitrary, capricious, and not in compliance with the statutes and rules" the court should defer to the agency's judgment on all discretionary matters within its jurisdiction.³⁸⁷ "[T]he reviewing court should not substitute its judgment for that of the agency."³⁸⁸

The problem is that these various formulations suggest varying degrees of judicial discretion. There is potentially a great difference in the leeway a court has to reject an agency's resolution of a legal issue depending on how its discretion is described.³⁸⁹ Potential abuse by manipulation of these various formulations of the standard of judicial review could be avoided if the courts would settle on one formulation.

H. Nondeferential Review of Questions of Law³⁹⁰

During the past year, Florida courts identified a total of nine circumstances which justify abandoning a deferential approach to agency resolution of questions of law. The foremost of these is a set of six circumstances which are linked to constitutional concerns. First, when the agency's interpretation of its rules is contrary to the rule's express

385. *Department of Professional Regulation v. Durrani*, 455 So. 2d 515, 517 (Fla. 1st Dist. Ct. App. 1984).

386. 516 So. 2d 292 (Fla. 1st Dist. Ct. App. 1987) (per curiam).

387. *Id.* at 295-96. See also *Okaloosa Asphalt Enters., Inc. v. Okaloosa County Gas Dist.*, 524 So. 2d 1095, 1097 (Fla. 1st Dist. Ct. App. 1988).

388. *Health Care & Retirement Corp.*, 516 So. 2d at 296.

389. One important factor in how a court describes its discretion is whether the agency was engaged in rule making or adjudication. Where an agency initially adopts a policy through adjudication rather than rule making procedures "there must be adequate support for its decision in the record of the proceedings." *Florida Cities Water Co. v. Public Serv. Comm'n*, 384 So. 2d 1280, 1281 (Fla. 1980). This appears to be a less deferential standard of judicial review. See *Gulf Coast Hosp., Inc. v. Department of Health & Rehabilitative Servs.*, 424 So. 2d 86 (Fla. 1st Dist. Ct. App. 1982). But see *id.* at 95-96 (Smith, J., concurring). Since 1979, attorneys can research the policy decisions of agencies rendered through orders in the *Florida Administrative Law Reports*. 9 FLA. B. ADMIN. L. SEC. NEWSL. 4 (May 1988).

390. See *Burris*, *supra* note 2, at 414-7.

language³⁹¹ or the legislature's intent,³⁹² then the courts will not defer to the agency's interpretation. Such action by the agency is beyond its delegated authority.³⁹³ One of the primary functions of judicial review is to ensure agencies remain within the scope of their delegated authority. Similarly, the reviewing court will not defer to an agency's interpretation of a statute which is clearly contrary to the plain statutory language.³⁹⁴ Second, reviewing courts do not defer to an agency's interpretation of a statute where the agency's interpretation was based upon the unconstitutionality of the statute.³⁹⁵ This is a function at the core of the judicial power and can not be delegated to an agency for resolution. Third, reviewing courts will not defer to an agency's interpretation of the scope of its own jurisdiction.³⁹⁶ Such a circumstance invites the possibility of improper use of the authority delegated to the agency by the legislature. Fourth, reviewing courts will not defer to an agency's interpretation of a statute where a court has already interpreted the statute contrary to the agency's interpretation.³⁹⁷ Fifth, reviewing courts will not defer to an agency's interpretation of a statute which will impose a fine for violation of a statute retroactively.³⁹⁸ This is arguably based, at

391. See, e.g., *Chin v. Department of Professional Regulation*, 516 So. 2d 94 (Fla. 3d Dist. Ct. App. 1987) (per curiam); *Daniels v. Unemployment Appeals Comm'n*, 531 So. 2d 1047 (Fla. 2d Dist. Ct. App. 1988) (dicta); *Gar-Con Dev., Inc. v. Department of Envtl. Regulation*, 468 So. 2d 413, 414-5 (Fla. 1st Dist. Ct. App. 1985).

392. *Satellite Television Eng'g, Inc. v. Department of General Servs.*, 522 So. 2d 440, 442-4 (Fla. 1st Dist. Ct. App. 1988). See also *Department of Military Affairs v. Griffin*, 530 So. 2d 1029, 1031-2 (Fla. 1st Dist. Ct. App. 1988); *Riggs v. Department of Professional Regulation*, 530 So. 2d 980 (Fla. 5th Dist. Ct. App. 1988).

393. See *supra* text accompanying notes 45-46.

394. *Martin Luther King Economic Dev., Corp. v. Department of Community Affairs*, 528 So. 2d 385, 388 (Fla. 3d Dist. Ct. App. 1988) (Ferguson, J., dissenting).

395. *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 250 (Fla. 1987). See *Radney v. Edwards*, 424 So. 2d 956, 957 (Fla. 1st Dist. Ct. App. 1983) (The court held that deputy commissioners in the workers' compensation system do not have the authority to rule on the constitutionality of statutes.).

396. *Rothblatt v. Department of Health & Rehabilitative Servs.*, 520 So. 2d 644, 645 (Fla. 4th Dist. Ct. App. 1988).

397. E.g., *Anderson v. Unemployment Appeals Comm'n*, 517 So. 2d 754, 755-56 (Fla. 2d Dist. Ct. App. 1987). See *Brewer v. Department of Corrections*, 531 So. 2d 978 (Fla. 1st Dist. Ct. App. 1988) (affirming agency interpretation of statute which was consistent with an earlier interpretation of the statute by the court).

398. *AAA Guaranteed Mortgage, Inc. v. Department of Banking & Fin.*, 517 So. 2d 761, 762 (Fla. 2d Dist. Ct. App. 1987). Cf. *Department of Highway Safety & Motor Vehicles v. Meck*, 468 So. 2d 993, 995 (Fla. 5th Dist. Ct. App. 1985) (But the interpretation may still be entitled to great weight.).

least in part, on section 18, article I, of the Florida Constitution, which restricts the power of agencies in shaping the nature of penalties. Sixth, the power to declare that a substantive statute should be applied retroactively is one that can only be exercised by the legislature, not by agencies.³⁹⁹ This ensures agencies do not invade the legislative function.

A second set of three circumstances were used by courts to justify a nondeferential approach to agency resolution of questions of law when there was no reason for the courts to suppose the legislature intended for them to rely on agency expertise in formulating policy.⁴⁰⁰ First, when an agency has resolved a conflict between two statutes by depriving one of the statutes of any continuing effect, then reviewing courts should not defer to the agency's interpretation.⁴⁰¹ Second, when the agency's interpretation of its rules is contrary to its interpretation of its rules in other cases, then the courts will not defer to the agency's subsequent inconsistent interpretation.⁴⁰² Third, reviewing courts will not defer to an agency's interpretation of a statute when it concerns an area traditionally within the court's expertise.⁴⁰³

399. *Id.* at 762. *See also* *Young v. Altenhaus*, 472 So. 2d 1152 (Fla. 1985); *R.P. v. State*, 389 So. 2d 658, 660 (Fla. 1st Dist. Ct. App. 1980) (Reviewing courts will not defer to agency retroactive interpretation of a penal statute.). *But see* *Lee v. Department of Health & Rehabilitative Servs.*, 518 So. 2d 364, 365 (Fla. 3d Dist. Ct. App. 1987).

400. *See* *Burris*, *supra* note 2, at 415-8.

401.

[I]t is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable. [The courts are] under no obligation to defer to an agency interpretation that resulted in a statute being voided by administrative fiat.

Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987). *See also* *Department of Transp. v. Lopez-Torres*, 526 So. 2d 674, 676 (Fla. 1988) (The court exercised nondeferential judicial review, but still affirmed the agency's interpretation of the two statutes.); *Williams v. Department of Transp.*, 531 So. 2d 994, 996 (Fla. 1st Dist. Ct. App. 1988) (The court did not defer to the agency's interpretation that its properly promulgated regulations conflicted with a statute in another area.). Nor will the courts defer to state agency interpretations of federal government regulations. *Bussey v. Department of Health & Rehabilitative Servs.*, 526 So. 2d 984, 986-87 (Fla. 1st Dist. Ct. App. 1988).

402. *See, e.g., Chin v. Department of Professional Regulation*, 516 So. 2d 94, 95 n.1 (Fla. 3d Dist. Ct. App. 1987) (per curiam). Of course if the decision of the agency is consistent with the interpretation given a statute by the courts then the reviewing court will defer to the agency's interpretation. *Florida Pub. Employees Council 79 v. Martin County Property Appraiser*, 521 So. 2d 243 (Fla. 1st Dist. Ct. App. 1988).

403. *Gobal Home Care, Inc. v. Department of Labor & Employment Sec.*, 521

It is important for an advocate to persuade a court on the issue of what standard of judicial review should be applied in a case because it may enhance the chance of success for the substantive arguments which follow that determination. To attorneys attacking an agency position on a question of law, it is critical to convince the reviewing court to view the question of law as one demanding a nondeferential approach to judicial review because it enhances the likelihood of success. Similarly, attorneys representing agencies will argue courts should adopt a deferential approach to judicial review because it enhances their chances of success.

I. Extraordinarily Deferential Judicial Review

There are cases where the court engages in extraordinarily deferential review on both questions of law and fact. In *State v. Division of Bond Finance*,⁴⁰⁴ the Florida Supreme Court noted that judicial review of an agency's exercise of authority to issue bonds "is limited to determining if a public agency has the authority to issue the . . . bonds and if the purpose of the bonds is legal and to ensuring that the bond issue complies with all legal requirements."⁴⁰⁵ Similarly, the Public Service Commission (PSC) has broad powers to make factual findings and policy judgments concerning the regulation of utility rates. The only time a reviewing court should overturn the PSC's decision in this area is when it "clearly would constitute an abuse of discretion."⁴⁰⁶ In *Meadowbrook Utility Systems, Inc. v. Public Service Commission*,⁴⁰⁷ applying this extraordinarily deferential standard of judicial review, the court affirmed the PSC's decision to allow Meadowbrook Utility Systems to recover, through the rate system, the expenses of presenting a

So. 2d 220 (Fla. 2d Dist. Ct. App. 1988) (Whether the relationship that qualifies as employee/employer rather than independent contractor); *Tucker v. Department of Professional Regulation*, 521 So. 2d 146 (Fla. 5th Dist. Ct. App. 1988) (What constitutes compensatory damages was within the court's expertise.).

404. 530 So. 2d 289 (Fla. 1988) (per curiam).

405. *Id.* at 290.

406. *Meadowbrook Utility Systems, Inc. v. Public Serv. Comm'n*, 518 So. 2d 326, 327 (Fla. 1st Dist. Ct. App. 1988) (per curiam). See generally *Surf Coast Tours, Inc. v. Public Serv. Comm'n*, 385 So. 2d 1353, 1354 (Fla. 1980) ("[T]he scope of this Court's certiorari review of orders of the . . . Commission is narrow [limited] to determin[ing] whether the Commission's action comports with the essential requirements of law and is supported by competent substantial evidence.").

407. 518 So. 2d 326 (Fla. 1st Dist. Ct. App. 1988) (per curiam).

rate increase request to the PSC. The court noted that if the PSC decided to "automatic[ally] award . . . rate case expense in every case, without reference to the prudence of the costs incurred in the rate case proceedings," it would be an abuse of discretion requiring a reviewing court to reverse the PSC's decision.⁴⁰⁸

VII. Land Use and Zoning

When a local governmental body such as the Board of County Commissioners acts in a quasi-judicial capacity,⁴⁰⁹ then judicial review may be had only by a writ of certiorari.⁴¹⁰ The APA does not apply because generally local governmental bodies are not administrative agencies covered by the statute.⁴¹¹ In such a case, the court is limited to the record created before the local governmental body.⁴¹² This is a form of limited and deferential judicial review.⁴¹³

Land use planning is a statutorily mandated but locally created "plan to control and direct the use and development of property within a county or municipality."⁴¹⁴ "Zoning . . . is the means by which the comprehensive plan is implemented, . . . and involves the exercise of discretionary powers within limits imposed by the [land use] plan" which the county or municipality adopted.⁴¹⁵ Zoning decisions are exercises of legislative power by county or municipal governments. There is a distinction between a general attack on the validity of a zoning deci-

408. *Id.* at 327.

409. *Walgreen Co. v. Polk County*, 524 So. 2d 1119, 1120 (Fla. 2d Dist. Ct. App. 1988) (Requests for a zoning variance are decided in a quasi-judicial proceedings held by the county commissioners.).

410. *Kemmons Wilson, Inc. v. Atlantic Utils.*, 523 So. 2d 633, 634 (Fla. 2d Dist. Ct. App. 1988). *See also Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 942-43 (Fla. 5th Dist. Ct. App. 1988) (timing for filing a writ of certiorari in such cases); *Elmore v. City of Orange City*, 528 So. 2d 997 (Fla. 5th Dist. Ct. App. 1988).

411. *Elmore*, 528 So. 2d at 998 (Fla. 5th Dist. Ct. App. 1988). *See* FLA. STAT. § 120.52(1)(c) (1987).

412. *City of Miramar v. Amoco Oil Co.*, 524 So. 2d 506, 507 (Fla. 4th Dist. Ct. App. 1988). *See also Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 943 (Fla. 5th Dist. Ct. App. 1988). *But see id.* at 947-51 (Sharp, C.J., dissenting) (argued de novo hearing could be held).

413. *E.g., Ceslow v. Board of County Comm'rs*, 428 So. 2d 701 (Fla. 4th Dist. Ct. App. 1983); *Campbell v. Vetter*, 392 So. 2d 6, 7-8 (Fla. 4th Dist. Ct. App. 1981).

414. *Machado v. Musgrove*, 519 So. 2d 629, 631-32 (Fla. 3d Dist. Ct. App. 1988) (en banc). *See* FLA. STAT. §§ 163.3167(1)-(6) (1987).

415. 519 So. 2d at 632. *See generally* Bryant, *Local Government Comprehensive Plans and the Administrative Procedure Act*, 62 FLA. B.J. 41 (October 1988).

sion and an attack on the validity of a zoning decision as inconsistent with the local land use plan. The nature of the challenge to a zoning decision will determine the standard of judicial review to be applied by a court. In reviewing a zoning decision where the challenge is a general claim that it is invalid, a court will use the "deferential fairly debatable test."⁴¹⁶ This test requires the reviewing court to affirm the decision even if "reasonable people could differ as to . . . [the] propriety" of the zoning decision.⁴¹⁷ The reviewing court should affirm the zoning decision under the fairly debatable test as long as it is "supported by competent and substantial evidence."⁴¹⁸

If a zoning decision is challenged on the grounds that it is inconsistent with the local comprehensive land use plan, then the reviewing court engages in nondeferential judicial review of the zoning decision. The question for a reviewing court in these cases "is whether the zoning authority's determination that a proposed development conforms to each element and objectives of the land use plan is supported by competent and substantial evidence."⁴¹⁹ In implementing this standard of judicial review, the court "makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with, or adherence to" the requirements of the land use plan.⁴²⁰ Land use plans do not involve the same degree of legislative discretion because they must comply with the Local Government Comprehensive Planning and Land Development Regulation Act.⁴²¹

VIII. Concluding Thoughts

There were no major changes or new trends in administrative law instituted in the last year. The courts decided only one case of first impression dealing with the question of whether the doctrine of equita-

416. *Id.*

417. *Id.*

418. *Town of Bay Harbor Islands v. Driggs*, 522 So. 2d 912, 914 (Fla. 3d Dist. Ct. App. 1988).

419. *Id.* See also *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 944 (Fla. 5th Dist. Ct. App. 1988).

420. *Id.* The court noted that this nondeferential approach to judicial review of zoning decisions was specifically authorized by the legislature in 1985 amendments to the Local Government Comprehensive Planning and Land Development Regulation Act. *Id.* at 633-34. FLA. STAT. § 163.3194(3)(a) (1985).

421. FLA. STAT. §§ 163.3161-3243 (1987).

ble tolling applied to administrative proceedings.⁴²² The courts reaffirmed a trend which began in 1981 of robbing the *Cross Key* decision of its effectiveness.⁴²³ The result is that Florida courts have moved into the national mainstream in the area of the delegation doctrine. The courts continued to engage in less than totally principled application of the standards of judicial review. In other areas the courts continued the process of gradually filling in the gaps in our knowledge about what the APA and other statutes require.

422. *Machules v. Department of Admin.*, 523 So. 2d 1132 (Fla. 1988).

423. See *supra* notes 8-17 and accompanying text.